

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1896.

No. 177.

THE BOARD OF COUNTY COMMISSIONERS OF THE
COUNTY OF LAKE, COLORADO, PETITIONER,

vs.

HARRY H. DUDLEY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FILED OCTOBER 11, 1897.

CERTIORARI AND RETURN FILED NOVEMBER 1, 1897.

(16,687.)

172
175
560

68
77

800
15
4000

(16,687.)

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a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the December term, A. D. 1896, of said court, begun and held at the United States court house, in the city of St. Louis, Missouri, on the first Monday in December, it being the seventh day of December, A. D. 1896, before the Honorable Walter H. Sanborn and Honorable Amos M. Thayer, circuit judges, and Honorable William Lochren, district judge.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest :

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the twenty-ninth day of June, A. D. 1896, a transcript of record, in pursuance of a writ of error directed to the circuit court of the United States for the district of Colorado, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in a certain cause wherein Harry H. Dudley was plaintiff in error and The Board of County Commissioners of the County of Lake, Colorado, was defendant in error, which said transcript of record, as printed in accordance with the designations of the parties for use on the hearing of said cause in said United States circuit court of appeals, is in the words and figures following, to wit :

1 In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

HARRY H. DUDLEY, Plaintiff in Error,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE,
Colorado, Defendant in Error.

To the clerk of said court and the above-named defendant in error :

You will please take notice that we hereby designate that in the printing of the record in the above-entitled cause the following exhibits, some of which were admitted in evidence and others of which were excluded, shall not be printed, to wit, Exhibits Ten (10) to Twenty-seven (27), inclusive, and Exhibits Thirty-one (31) and Thirty-two (32), and that all of the balance of the record be printed.

H. B. JOHNSON AND
DAN'L E. PARKS,
Attorneys for Plaintiff in Error.

Received a copy of the above designation this 29th day of June, A. D. 1896.

THOMAS, BRYANT & LEE,
Attorneys for Defendant in Error.

No. 821. In the U. S. circuit court, eighth circuit. Harry H. Dudley *vs.* The Board of County Commissioners of the County of Lake, Colorado. Designation of pl'ff in error of record to be printed. Filed Jul- 2, 1896. John D. Jordan, clerk. Dan'l E. Parks, H. B. Johnson, att'ys for pl'ff in error.

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

HARRY H. DUDLEY, Plaintiff in Error,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE,
Defendant in Error.

To the clerk of said court and the above-named plaintiff in error :

You will please take notice that in addition to the matters designated by the attorneys for the plaintiff in error to be printed
2 in the printed transcript of record in the above-entitled cause, which was served upon us the 29th day of June, A. D. 1896, we desire certain other portions of said record to be printed by said clerk for the reason that they will be necessary to a hearing of said cause by the judges of said court when the same is reached for hearing ; and the portions of said record which we so designate in addition to those designated by the said plaintiff in error are the following :

Exhibit No. 10 which was offered by the defendant upon the trial of said cause, and admitted in evidence ; also exhibits numbered 16, 17, 18, 19, 20, 21, 23 and 25 all of which were offered in evidence by the defendant on the trial of said cause and admitted by the court.

You are further notified that in lieu of printing Exhibit No. 10 attorneys for the defendant in error will consent that a stipulation may be signed by counsel for both sides, a copy of which is herewith served, and that said stipulation may be printed and taken to be in lieu of Exhibit No. 10 and may be printed in lieu of printing said Exhibit 10 at length and in case plaintiff in error does not consent to take said stipulation in lieu of said exhibit, then we hereby designate said exhibit to be printed in full.

GEORGE R. ELDER,

THOMAS, BRYANT AND LEE,

Attorneys for Defendant in Error.

Received a copy of the above designation, together with a copy of said stipulation and notice this 10th of July, A. D. 1896.

DAN'L E. PARKS,

Pl'ff's Att'y.

In the United States circuit court of appeals. Harry H. Dudley *vs.* The Board of County Commissioners of Lake County. Notice as to printing record. Filed Jul- 23, 1896. John D. Jordan, clerk. Thomas, Bryant & Lee, att'ys for def. in error.

Pleas in the Circuit Court of the United States for the District of Colorado, Sitting at Denver.

Be it remembered that heretofore and on to wit: the 31st day of March A. D. 1892 came Harry H. Dudley by Albert E. Grier his attorney and filed in said court his complaint, and sued out of and under the seal of said court a writ of summons against The Board of County Commissioners of the County of Lake, Colorado.

3 And the said complaint is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, } ss:
District of Colorado,

Complaint.

In the Circuit Court of the United States of the 8th Judicial Circuit Held within and for said District of Colorado.

HARRY H. DUDLEY, Plaintiff,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, }
Colorado, Defendant.

The above-named plaintiff complains against the above-named defendant, and alleges the following facts constituting his cause of action:

That he is a citizen and resident of the State of New Hampshire; that the said defendant is a political governmental corporation duly organized under and by virtue of the laws of the State of Colorado, and has been so organized and existing since the 8th day of February, A. D. 1879, that by the laws of the State of Colorado as they existed in A. D. 1879, and until this time, the board of county commissioners of this county and of all the counties of the State were and are authorized to create indebtedness for the purpose of erecting necessary public buildings, after having submitted at a general election the question of incurring such debt to the legally qualified electors of said county, who had paid a tax upon property assessed to them in such county for the year immediately preceding such election, that the said Board of County Commissioners of the County of Lake duly, in due time form and manner submitted the question of incurring the debt evidenced by the bonds and coupons herein-after mentioned to such qualified electors at the general election legally called and duly held in said county of Lake on the 7th day of October, A. D. 1879; that the majority of all the legal ballots cast upon the question at said election were in favor of incurring the said indebtedness. That thereupon the said Board of County Commissioners of said County of Lake did on the 31st day of July, A. D. 1880, cause to be made and executed certain bonds of said county of Lake, which said bonds are in words and figures following to wit:

No.—.

\$500.

UNITED STATES OF AMERICA, *County of Lake, Colorado.*

Know all men by these presents that the County of Lake, in the State of Colorado, acknowledges itself indebted, and promises to pay to ——— or bearer five hundred dollars, for value received, redeemable at the pleasure of the county after ten years, and absolutely (sue) and payable twenty years from the date hereof at the office of the treasurer of the county of Lake aforesaid, in the city of Leadville, in said county, with interest at the rate of ten per centum per annum, payable annually on the first day of April of each year, at the office of the county treasurer aforesaid, upon delivery of the coupon hereto attached.

This bond is one of a series of fifty thousand dollars, which the board of county commissioners of said county have issued for the purpose of erecting necessary public buildings, by virtue of and in compliance with a vote of a majority of the qualified voters of said county, at an election duly held on the 7th day of October, A. D. 1879, and under and by virtue of and in compliance with an act of the General Assembly of the State of Colorado, entitled "An act concerning counties, county officers and county government and repealing laws on these subjects" approved March 24, A. D. 1877, and it is hereby certified that all the provisions of said act have been fully complied with by the proper officers in the issuing of this bond.

In testimony whereof, the Board of County Commissioners of said County of Lake has caused the seal of the said county and the signature of its chairman to be hereunto affixed, and the same to be attested by the clerk of the county, at Leadville, this thirty-first day of July, A. D. 1880.

_____,
Chairman Board of County Commissioners.

[COUNTY SEAL.]

Attest: _____,
County Clerk.

And this plaintiff further says that to each of said bonds were attached coupons for the annual interest accruing on said bonds, which said coupons were in form as follows:

§—. The County of Lake, in the State of Colorado, §—.

Will pay the bearer — dollars at the office of the treasurer of Lake county on — interest on bond for necessary public buildings.

_____,
Chairman Board of County Commissioners.

No.—.

And that there was a sufficient number of coupons attached to each of said bonds in form as above set forth, to provide for the payment of all of the interest on said bonds.

5 Plaintiff further alleges that on to wit the 31st day of July' A. D. 1880, the said defendant The Board of County Commissioners of the said County of Lake, for value received, made, executed sold and delivered said bonds in the aggregate amount of fifty thousand dollars, and each of them to sundry *bona fide* purchasers thereof. That previous thereto said bonds and each of them were signed by the chairman of the board of county commissioners of said county to wit: Joseph Pearce, and attested by the county clerk of said county of Lake, to wit Joseph H. Wells under the seal of said county of Lake; and that the said coupons attached to the said bonds and each of them were also filled up and signed by said Joseph Pearce, the then chairman of the Board of County Commissioners of said County of Lake. That said coupons and each of them bear the number of the bond to which it was and is attached, and the same are severally countersigned by Joseph H. Wells, county clerk of said county of Lake.

That the said county of Lake from that time, to wit, from the 31st day of July, A. D. 1880, up to and until the first day of April, A. D. 1884, paid the interest on said bonds annually, in accordance with the terms of said bonds, and of the coupons thereto attached, and plaintiff avers that defendant on the first day of April, A. D. 1884, made default in the payment of said coupons, and then and there neglected, omitted and refused and still neglects omits and refuses to pay the same or any part thereof, and the said defendant on the first day of April, A. D. 1885, also made default in the payment of the interest due on the coupons attached to said bonds due and payable on the first day of April, A. D. 1886, and has ever since that time and does still refuse and neglect to pay the same or any part thereof, and the said defendant on the first day of April, A. D. 1887, also made default in the payment of the interest expressed in coupons attached to said bonds and due on the first day of April, A. D. 1887, and still does refuse and neglect to pay said interest or any part thereof; and the said defendant on the first day of April, A. D. 1888, also made default of the interest expressed in coupons attached to said bonds, and does still refuse and neglect to pay said interest or any part thereof; and the said defendant on the first day of April, A. D. 1889, also made default of the interest expressed in coupons attached to said bonds and due on the first day of April, A. D. 1889, and still does refuse and neglect to pay said interest or any part thereof; and the said defendant on the first day of April, A. D. 1890, also made default of the interest expressed in coupons attached to said bonds and due on the first day of April,

6 A. D. 1890, and still does refuse and neglect to pay said interest or any part thereof; and the said defendant on the first day of April A. D. 1891, also made default in the payment of the interest expressed in coupons attached to said bonds, and due on the first day of April, A. D. 1891, and still does refuse and neglect to pay said interest or any part thereof.

Plaintiff further alleges that he is the owner and holder of coupons formerly attached to and forming a part of certain of the above-described bonds of said county of Lake, numbered 4, 5, 6, 7

8, 9, 10 and 11, respectively, to wit: twenty-five of said bonds being for the sum of one thousand dollars each with one-hundred-dollar coupons attached and fifty of said bonds being for the sum of five hundred dollars each with fifty-dollar coupons attached, and the numbers of the bonds to which attached and the amount of the coupons being more particularly set forth in Exhibits "A," "B," "C," "D," "E," "F," "G," and "H" respectively, as follows, to wit:

DENVER, COLO., March 31, 1892.

Lake County (Colo.) Public Building Bond Coupons.

Exhibit "A" coupon No. 4 (due April 1, A. D. 1884)		
from bonds Nos. 92 to 111 inc. say 20 cpns. at		
\$50.....	.....	\$1,000
Exhibit "B" coupon No. 5 (due April 1, A. D. 1885)		
from bonds Nos. 55 to 60 inc. say 6 cpns. at \$100.	\$600	
Bonds Nos. 92 to 111 inc. say 20 cpns. at \$50.....	1,000	
	<hr/>	1,600
Exhibit "C" coupon No. 6 (due April 1, A. D. 1886)		
from bonds Nos. 80, 81 and 82, say three coupons		
at \$100.....	300	
Bonds Nos. 83 to 86 inc. and 92 to 111 inc., say 24		
coupons at \$50.....	1,200	
	<hr/>	1,500
Exhibit "D" coupon No. 7 (due April 1, A. D. 1887)		
from bonds Nos. 55 to 64 inc., 68 to 79 inc. and 80		
to 82 inc., say 25 coupons at \$100.....	2,500	
Bonds Nos. 65, 66, 67, 87 to 91 inc., 83 to 86 inc. and		
92 to 111, say 32 coupons at \$50.....	1,600	
	<hr/>	4,100
Exhibit "E" coupon No. 8 (due April 1, A. D. 1888)		
from bonds Nos. 55 to 64 inc. 73 to 79 inc., and 80		
to 82 inc., say 20 coupons at \$100.....	2,000	
Bonds Nos. 65, 66, 83 to 86 inc., and 92 to 111 inc.,		
say 26 coupons at \$50.....	1,300	
	<hr/>	3,300
7 Exhibit "F" coupon No. 9 (due April 1,		
A. D. 1889) from bonds Nos. 55 to 64 inc.		
68 to 79 inc., and 80 to 82 inc. say 25 coupons at		
\$100.....	2,500	
Bonds Nos. 65, 66, 67, 83 to 91 inc., and 92 to 129		
inc. say 50 coupons at \$50.....	2,500	
	<hr/>	5,000

DENVER, COLO., March 31, 1892.

Lake County (Colo.) Public Building Bond Coupons.

Exhibit "G" coupon No. 10 (due April 1, A. D. 1890) from bonds Nos. 55 to 64 inc. and 68 to 82 inc. say 25 coupons at \$100 each.....	2,500	
Bonds Nos. 65 to 67 inc. 83 to 91 and 92 to 912 inc. say 50 coupons at \$50.....	2,500	\$5,000

Exhibit "H" coupon No. 11 (due April 1, A. D. 1891) from bonds Nos. 55 to 64 inc. and 68 to 82 inc. say 25 coupons at \$100.....	2,500	
Bonds Nos. 65 to 67 inc. 83 to 91 inc. and 92 to 129 inc. say 50 coupons at \$50.....	2,500	5,000

Summary of Coupons in Exhibits.

Exhibit—		
A. Coupon No. 4, due April 1, A. D. 1884.....	\$1,000	
B. Coupon No. 5, " " 1885.....	1,600	
C. Coupon No. 6, " " 1886.....	1,500	
D. Coupon No. 7, " " 1887.....	4,100	
E. Coupon No. 8, " " 1888.....	3,300	
F. Coupon No. 9, " " 1889.....	5,000	
G. Coupon No. 10, " " 1890.....	5,000	
H. Coupon No. 11, " " 1891.....	5,000	
Total.....	\$26,500	

That the principal due on said coupons amounts to the following sums, to wit: amount due on coupons falling due on April 1, A. D. 1884, one thousand dollars (\$1,000); amount due on coupons falling due on April 1, A. D. 1885, one thousand six hundred dollars (\$1,600); amount due on coupons falling due on April 1, A. D. 1886, one thousand five hundred dollars (\$1,500); amount due on coupons falling due on April 1, 1887, four thousand one hundred dollars (\$4,100); amount due on coupons falling due on April 1, A. D. 1888, three thousand three hundred dollars (\$3,300); amount due on coupons falling due on April 1, A. D. 1889, five thousand dollars (\$5,000); amount due on coupons falling due on April 1, 1890, five thousand dollars (\$5,000); amount due on coupons falling due on April 1, A. D. 1891, five thousand dollars (\$5,000).

8 And plaintiff avers that he became the purchaser of said coupons before this action, for a valuable consideration paid by him and without notice of any claim at law or in equity, affecting their validity.

Plaintiff further alleges that the amounts due on all of said coupons are now wholly due and unpaid.

Wherefore the said plaintiff demands judgment against the said defendant for the sum of twenty-six thousand five hundred dollars (\$26,500) together with interest on the sum of one thousand dollars (\$1,000) from the first day of April, A. D. 1884, to the date of rendi-

tion of judgment herein at the rate of ten per cent. per annum ; also interest on the sum of one thousand six hundred dollars (\$1,600) from the first day of April, A. D. 1885, at the rate of ten per cent. per annum until date of rendition of judgment herein ; also interest on the sum of one thousand five hundred dollars (\$1,500) from the first day of April A. D. 1886, at the rate of ten per cent. per annum until date of rendition of judgment herein ; also interest on the sum of four thousand one hundred dollars (\$4,100) from the first day of April, A. D. 1887, at the rate of ten per cent. per annum until rendition of judgment herein ; also interest on the sum of three thousand three hundred dollars from the first day of April, A. D. 1888, at the rate of ten per cent. per annum until rendition of judgment herein ; also interest on the sum of five thousand dollars (\$5,000) from the first day of April, A. D. 1889, at the rate of ten. per cent. per annum until date of rendition of judgment herein ; also interest on the sum of five thousand dollars (\$5,000) from the first day of April, A. D. 1890, at the rate of ten per cent. per annum until date of rendition of judgment therein ; also interest on the sum of five thousand dollars (\$5,000) from the first day of April, A. D. 1891, at the rate of ten per cent. per annum until date of rendition of judgment herein.

ALBERT E. GRIER,

Plaintiff's Attorney, 202 Ernest & Crammer

Block, Denver, Colorado.

UNITED STATES OF AMERICA, }
State of Colorado, County of Arapahoe, } ss :

James H. Morris, being duly sworn, says that he has read the foregoing complaint, and knows the contents thereof ; that the same is true of his own knowledge except as to those matters which are therein stated on information and belief, and as to those matters he believes it to be true ; that the plaintiff in said cause is not a
 9 citizen or resident of the State of Colorado, and is not within the State ; and that all the material allegations of said complaint are within the knowledge of affiant.

JAMES H. MORRIS.

Subscribed and sworn to before me this 31st day of March, A. D. 1892.

[SEAL.]

GEORGE W. WRIGHT,

Notary Public in and for Arapahoe County, Colo.

My commission expires May 24th, 1892.

Indorsed : 2758. Circuit court. Dudley vs. B'd Com'rs, Lake County. Complaint. Filed M'ch 31, 1892. Robert Bailey, clerk U. S. circuit court. Albert E. Grier, pl'ff's att'y, att'y-at-law, Denver, Colorado.

And the said summons and proof of service is in words and figures as follows, to wit :

Summons.

UNITED STATES OF AMERICA, } ss :
District of Colorado,

In the Circuit Court of the United States for the District of Colorado.

HARRY H. DUDLEY, Plaintiff,
versus

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE,
 Colorado, Defendant. }

Complaint filed in the clerk's office this 31st day of March, A. D.
 1892.

The President of the United States of America to the Board of
 County Commissioners of the County of Lake, Colorado, Greet-
 ing:

You, and each of you, are hereby notified that an action has been
 brought in said court, by Harry H. Dudley, plaintiff, against you
 as defendant to recover the sum of twenty-six thousand five hundred
 dollars (\$26,500) due from you the said defendants to the said plain-
 tiff upon certain interest coupons upon certain public building fund-
 ing bonds issued by you, together with certain interests thereon as
 more particularly set forth and described in the complaint filed
 herein and to which reference is here made.

You are hereby required to appear and demur or answer to the
 complaint filed in said action, in said court, within ten days
 10 (exclusive of the day of service) after this summons shall be
 served on you, if such service shall be made within the county
 of Arapahoe; otherwise within forty days from the day of service;
 and if you fail so to (—), the said plaintiff will take judgment against
 you by default, according to the prayer of the said complaint, and
 will apply to the court for the relief demanded therein.

Witness, the Honorable Melville W. Fuller, Chief Justice of the
 Supreme Court of the United States, and the seal of the said circuit
 court, at the city of Denver, in said district, this 31st day of March,
 A. D. 1892, and of the Independence of the United States the 116th
 year.

[SEAL.]

ROBERT BAILEY, *Clerk.*

Proof of Service.

UNITED STATES OF AMERICA, } ss :
District of Colorado,

DENVER, COLO., April 14, A. D. 1892.

I hereby certify, that I received the within writ on the 31st day
 of March, A. D. 1892, and that I have personally served the same
 upon the said defendant by delivering to Charles Whipple, clerk
 and recorder of Lake county, Colo., and each of them personally, a

true copy of the within writ, at the time and place as follows : at Leadville, county of Lake, on the 13th day of April A. D. 1892.

This writ therefore returned served as the law directs, this 14th day of April, A. D. 1892.

ALBERT H. JONES, *Marshal*,
By A. W. BROWN,
Deputy Marshal.

Indorsed : No. 2758. Circuit court of the United States for the district of Colorado. Harry H. Dudley, plaintiff, *versus* The Board of County Commissioners of the County of Lake, Colorado, defendant. Summons. Filed this 16th day of April, A. D. 1892. Robert Bailey, clerk. Albert E. Grier, of Denver, attorney for plaintiff.

UNITED STATES OF AMERICA, }
District of Colorado, } ss :

In the Circuit Court of the Eighth Judicial Circuit in and for said District.

HARRY H. DUDLEY, Plaintiff,
vs.

THE BOARD OF COUNTY COMMISSIONERS FOR THE COUNTY OF LAKE,
State of Colorado, Defendant. }

The defendant, by Philip O'Farrell and Thomas, Bryant & Lee, its attorneys, now comes and for answer to the complaint herein alleges :

11 First. That whether the plaintiff is a citizen or resident of the State of New Hampshire the defendant has not and cannot obtain sufficient knowledge or information on which to base a belief. It admits that the defendant is a municipal corporation organized and existing under and by virtue of the laws of the State of Colorado since the 8th day of February, A. D. 1879, but it denies that by the laws of the State of Colorado as they existed in said year A. D. 1879, or at all since that time the said defendant was or is authorized to create any indebtedness for the purpose of erecting necessary public buildings after having submitted at a general election the question of incurring such debt to the legal and qualified electors of the said county who had paid a tax upon property assessed to them in said county for the year immediately preceding such election, unless at such time the amount and character of its indebtedness had not equaled or exceeded the constitutional limitation imposed thereupon.

It denies that the said board of county commissioners properly submitted any question of incurring the debts evidenced by any bonds or coupons mentioned in said complaint at any general election on the 7th day of October, 1879, or elsewhere, or that the same was properly had or carried.

It denies on information and belief that the said so-called bonds in said complaint mentioned, if any such there be, are in words and figures as set forth in said complaint ; that whether the said county,

for value received, made, executed sold or delivered said so-called bonds, or attempted to make, execute or deliver said so-called bonds in the aggregate sum of fifty thousand dollars, or in any sum, or any of said bonds, to *bona fide* purchasers, the defendant has not and cannot obtain sufficient knowledge or information on which to base a belief.

That whether said so-called or pretended bonds, or any of them, were signed by the chairman of said board, or attested by the clerk thereof under the seal of said county, and whether said so-called or pretended coupons, or any of them, were ever executed or signed by said chairman and countersigned by said clerk the defendant has not and cannot obtain sufficient knowledge or information on which to base a belief.

It denies that the same were executed, sold or delivered on the 31st day of July, A. D. 1880, or at any other time during said year.

It admits that the defendant paid interest upon certain bonds up to and until the first day of April A. D. 1884, but whether
12 the said interest so paid was upon the said bonds mentioned in said complaint the defendant has not and cannot obtain sufficient knowledge or information on which to base a belief.

But it admits that from the first day of April A. D. 1884, to the said first day of April, A. D. 1891, inclusive and during each of the years intervening, the said defendant declined, neglected, omitted and refused, and still neglects, omits, declines and refuses to pay interest on said pretended or any bonds which are alleged to be the bonds of said county or upon which it is pretended the said county is liable, and that it will continue to refuse, neglect and decline to pay the same until and unless by the judgment of this honorable court it is required so to do.

That whether the plaintiff is the owner and holder of certain or any of the so-called coupons, or whether said so-called coupons are, in whole or in part, for the sums mentioned as alleged in said complaint, or any other sums, or whether the plaintiff became the purchaser of said so-called coupons before the commencement of this action or at any time for a valuable or any consideration paid by him and that without any notice of any claim at law or in equity affecting the validity of all or any of them the defendant has not and cannot obtain sufficient knowledge or information on which to base a belief; but it denies that it is indebted to the said plaintiff in the sum or sums of money mentioned in said complaint, or any part or portion thereof by reason of anything in said complaint contained.

And for a second and separate and further answer and defense to said complaint it alleges:

That the said alleged, supposed and so-called bonds and (and) the said alleged and so-called coupons thereto alleged to have been attached mentioned and set forth in the complaint herein were attempted and assumed to be made and issued, executed and delivered and the debt and obligation thereof assumed and attempted to be contracted by the said county of Lake and by the said Board of County Commissioners of said County of Lake in direct violation

and contravention of the provisions, requirements and conditions of section 6, article eleven (11) of the constitution of the State of Colorado and the laws made in pursuance thereof, because the defendant saith that the assessed valuation of the taxable property of the said county of Lake in and for the year A. D. 1879 was less than the sum of \$5,000,000.00, to wit, the sum of \$3,485,628.00.

That the aggregate amount of the indebtedness of said county contracted and incurred by said county through and by its
13 board of county commissioners subsequent to the 1st day of July, A. D. 1876, and prior to the said 7th day of October, A. D. 1879 and on said day existing and outstanding against said county was the sum of to wit, \$56,966.47.

That for the said year 1879 the aggregate amount of indebtedness which said county or said board of county commissioners might lawfully contract, assume or incur as legal and outstanding against said county by submitting the question thereof to the voters of said county duly qualified to vote thereon, or in any other manner or for any purpose or purposes whatsoever was limited by the said constitutional proviso to the sum of not more than \$41,827.54.

And the defendant further answering says:

That the limitation of the aggregate amount of indebtedness which could lawfully be contracted by said county or its board of county commissioners or permitted to exist or be an outstanding liability against said county on or before the said 7th day of October A. D. 1879, had already been reached and exceeded and said limitation of indebtedness aforesaid had already been reached and exceeded as aforesaid before the pretended debt of \$50,000.00 alleged to be evidenced by the so-called and pretended bonds in said complaint mentioned and the interest on which is alleged to be evidenced by the so-called and pretended coupons in said complaint mentioned was assumed to be submitted to or voted upon by the voters of said county qualified to vote thereon.

Wherefore, defendant prays judgment for its costs in this behalf expended.

3. And for a third and further answer and defense to the said action the defendant says, on information and belief, that notwithstanding the said question of the submission of the contraction of said indebtedness for the purposes aforesaid was submitted to the qualified voters of the said county of Lake at a general election held on, to wit, the 7th day of October A. D. 1879, yet the defendant says, on information and belief, that none of the said bonds were issued or authorized to be issued prior to the 31st day of July A. D. 1880, which, according to its information, is the date expressed in the said pretended bonds, and the defendant says that the assessed valuation of the taxable property in said county of Lake in and for the year A. D. 1880, was more than \$5,000,000.00, to wit, \$11,126,489.00, and that the aggregate amount of the indebtedness of said county by the said county or its board of county commissioners contracted or incurred prior to the 31st day of July A. D. 1880, and on said day existing and outstanding against said county was the sum, to wit, of \$235,801.39.

14 That in the year A. D. 1880 the aggregate amount of debt or liability which said county or its said county commissioners might lawfully contract or incur and permit to be in existence and outstanding against said county by submitting the question thereof to the voters of said county qualified to vote thereon or in any other manner or for any purpose or purposes whatsoever, was limited by the 6th section of the 10th article of the constitution of the State of Colorado to not more than \$66,758.93.

That the limitation of the aggregate amount of indebtedness which could then lawfully be contracted or incurred for or on behalf of or against said county had long before and on, to wit, the said 31st day of July, A. D. 1880, been reached and exceeded and had, therefore, been reached, passed, and exceeded before the said so-called and pretended bonds and the said so-called and pretended coupons in said complaint mentioned were issued, attempted or assumed to be issued, executed, transferred or delivered as in said complaint stated.

Wherefore, the defendant declares that the said bonds were and each of them was and is, and the said coupons were and each of them was and is void, null and of no effect and do not constitute any indebtedness whatever against the said county of Lake or against this defendant.

Wherefore, defendant prays judgment for its costs in this behalf expended.

And for a fourth separate and further answer and defense in this behalf the defendant says:

That although it is pretended and alleged that the said bonds to which the said pretended coupons of the plaintiff were attached were issued, sold, transferred and delivered on, to wit, the 31st day of July, A. D. 1880, yet the defendant says upon information and belief, that in truth and in fact the said bonds were transferred, delivered and assigned by the said county of Lake or its board of county commissioners, on, to wit, the 15th day of November A. D. 1880 as of the date of the said 31st day of July, A. D. 1880, and not at the said time or date; that on the said date when the said bonds were actually issued the amount of the indebtedness of the county of Lake then incurred and outstanding greatly exceeded twice the amount of \$1.50 to each \$1,000.00 thereof and the assessed valuation of its taxable property at the time exceeded \$5,000,000.00 and that the amount represented by said bonds was in excess of and beyond the amount already specified and referred to and the same was therefore void and of no effect.

15 And for a fifth and further and separate defense and answer to the said complaint the defendant says:

That as to so much of said complaint as is based upon or refers to certain so-called coupons numbered respectively 4 and 5 being Exhibit "A" and Exhibit "B" in said complaint referred to, and further in said complaint referred to as "coupon No. 4, due April 1st, A. D. 1884, from bonds Nos. 92 to 111 inclusive, 20 coupons at \$50.00—\$1,000.00" and "coupon No. 5, due April 1st, A. D. 1885, from bonds Nos. 55 to 66 inclusive, 6 coupons at \$100.00—\$600.00

and bonds Nos. 92 to 111 inclusive, 20 coupons at \$50.00—\$1,000.00 \$1,600.00" the defendant alleges:

That the causes of action, if any there be, based upon or arising out of said so-called coupons above referred to, in favor of the plaintiff and against the defendant, accrued on the 1st day of April, A. D. 1884 and on the last day of April, A. D. 1885 respectively, as is alleged in said complaint, and more than six years prior to the commencement of this action.

Wherefore, the defendant prays judgment for its costs in this behalf expended.

And for a sixth and separate and further defense and answer to so much of said complaint and the matters and things therein stated as refer to and are based upon the interest upon the amount of the so-called coupons therein referred to and declared upon from the dates upon which said so-called coupons are alleged to have become due and payable, to wit, interest on the sum of \$1,000.00 from April 1st, A. D. 1884, to the date of rendition of judgment herein, and on the sum of \$1,600.00 from April 1st, A. D. 1885, to the date of rendition of judgment herein, and on the sum of \$1,500.00 from April 1st, A. D. 1886, to the date of rendition of judgment herein, and on the sum of \$4,100.00 from April 1st, A. D. 1887, to the date of rendition of judgment herein, and on the sum of \$3,300.60 from April 1st, 1888, to the date of rendition of judgment herein, and on the sum of \$5,000.00 from April 1st, 1889, to the date of rendition of judgment herein, and on the sum of \$5,000 from April 1st, 1890, to the date of rendition of judgment herein and on the sum of \$5,000.00 from April 1st, 1891, to the date of rendition of judgment herein at the rate of ten per cent. per annum, defendant alleges:

That said so-called coupons are and were, as is alleged in said complaint, attached to certain so-called bonds and represented the amount of annual interest due and payable on said so-called bonds and were in themselves evidences of no part of said assumed
 16 or pretended indebtedness evidenced by said so-called bonds but indeed and in fact said so-called coupons represented interest on said principal of said so-called indebtedness and no part or portion of the principal itself.

Wherefore, the defendant prays judgment against the plaintiff as to said items and each of them.

And for a seventh and additional answer and defense to the said supposed cause of action this defendant says:

That by section 448 of the General Laws of the State of Colorado of 1877, the same then being in force, it is provided and conditioned that the submission of the question of incurring an indebtedness for the erection of necessary public buildings etc., to a vote of the people shall not be had, made or done if, at the time of such submission the aggregate amount of indebtedness of the county exclusive of debts contracted prior to July 1st, 1876, in counties in which the assessed valuation of the property shall be less than \$5,000,000.00 and exceeding \$1,000,000.00, shall equal \$12.00 on each \$1,000.00 thereof, and the defendant says that at the time of the proposed

submission of the said question of said indebtedness to the said legal, qualified voters of said county of Lake and at the time of said election on the said 7th day of October, A. D. 1879, the assessed valuation of the property of said Lake county was to wit, \$3,485,628.00 and that at such time the aggregate amount of indebtedness of the said county, exclusive of any and all debts contracted prior to July 1st, 1876, was \$56,966.47 being in amount over and in excess of \$12.00 on each \$1,000.00 of said valuation.

Wherefore, the defendant says that the action of the said county commissioners in passing any and all resolutions submitting the question of the creation of said indebtedness to the vote of the said qualified electors, and the action of said electors in voting thereon, if any did vote thereon, and the action of the said county commissioners in issuing bonds upon said vote were and are and each of them was and is absolutely null and void.

That the said supposed cause of action of the plaintiff is based upon coupons attached to certain so-called pretended bonds claimed and alleged to have been issued under and in pursuance of such vote and proceedings taken at said time and under said conditions and none other.

Wherefore, the defendant prays judgment and for its costs in this behalf expended.

PHIL. O'FARRELL AND
THOMAS, BRYANT & LEE,
Att'ys for Defendant.

17 UNITED STATES OF AMERICA, } ss:
District of Colorado,

Personally appeared Charles S. Thomas who being first duly sworn according to law deposes and says:

That he is one of the attorneys for the defendant in the above-entitled cause, and makes this affidavit because of the absence of all of the members of said board and its officers from the said county where affiant resides and where the said suit is pending; that he has read the above and foregoing answer and that the matters and things therein contained are true according to the best of his knowledge, information and belief.

CHARLES S. THOMAS.

Subscribed and sworn to before me this 13th day of June, A. D. 1892.

My commission expires March 26", '96.

[SEAL.]

SAM. MILTON,
Notary Public.

Indorsed: No. 2758. In the circuit court of Colorado. Harry H. Dudley, plaintiff, vs. The Board of County Commissioners Lake County, defendant. Answer. Filed Jun-13, 1892. Robert Bailey, clerk U. S. circuit court. Phil. O'Farrell, Thomas, Bryant & Less, attorneys for def't.

Replication.

UNITED STATES OF AMERICA, }
State and District of Colorado, } ss :

In the Circuit Court of the United States of the Eighth Judicial Circuit Held at Denver, within and for said District of Colorado.

HARRY H. DUDLEY, Plaintiff,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, }
 Colorado, Defendant. }

Now comes the plaintiff in the above-entitled cause, and, for replication to the answer of defendant, denies each and every allegation therein contained.

D. E. PARKS AND
 H. B. JOHNSON,
Attorneys for Plaintiff.

STATE OF COLORADO, }
County of Arapahoe, } ss :

George H. Taylor, being duly sworn on oath says, that he has read the foregoing replication and knows the contents thereof; that said plaintiff is not a resident of, or now within the State of
 18 Colorado; that the facts are within the knowledge of affiant; that the said replication is true of the knowledge of affiant, except as to the matters which are therein stated on information and belief, and as to those matters, he believes it to be true.

GEORGE H. TAYLOR.

Subscribed and sworn to before me this second day of December, A. D. 1893.

[SEAL.]

GEORGE W. WRIGHT,
Notary Public in and for Arapahoe County, Colo.

My commission expires May 5th, A. D. 1896.

Indorsed: No. 2758. In the circuit court. Harry H. Dudley vs. The Board of County Commissioners of Lake County. Replication. Filed Dec. 2, 1893. Robert Bailey, clerk U. S. circuit court. H. B. Johnson & D. E. Parks, att'ys for plaintiff.

Fiftieth day, November term.

TUESDAY, *January 7th*, A. D. 1896.

Present: The Honorable Moses Hallett, district judge and the Honorable John A. Riner, district judge of the district of Wyoming, assigned to the district of Colorado and other officers as noted on the 5th day of November, 1895.

And before the Honorable John A. Riner, district judge of the district of Wyoming, assigned to the district of Colorado, the following proceedings were had:

HARRY H. DUDLEY

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY
of Lake.

2758.

Money demanded.

At this day comes the plaintiff by H. B. Johnson, Esq., his attorney and the defendant by W. H. Bryant, Esq., its attorney also comes, and thereupon comes a jury, to wit:

Jonathan W. Pendleton,
George W. Gildersleeve,
C. H. McLaughlin,
M. M. Baldwin,
Charles E. Pennock,
G. B. Nixon,

William A. Craig,
G. C. Killebrew,
Frederick C. Eberly,
Winton Smith,
Joseph C. Dresser,
James J. Flint,

twelve good and lawful men, and they are duly selected and tried empanelled and sworn to well and truly try the matters at issue herein, and a true verdict render according to the evidence.

19 And the said jurors having heard the evidence produced herein and the instructions of the court, upon their oaths do say they find the issues herein joined for the defendant.

Wherefore it is considered by the court, that the said defendant go hence hereof without day and have and recover of and from the said plaintiffs its costs by it in this behalf laid out and expended to be taxed and have execution therefor.

And thereupon on motion of the plaintiff day and until sixty (60) days from this day is allowed him within which time to file a bill of the exceptions reserved by him upon the trial of the issues herein joined.

Fifty-ninth day.

FRIDAY, January 17th, A. D. 1896.

Present: The Honorable Moses Hallett, district judge, and the Honorable John A. Riner, district judge of (this) district of Wyoming, assigned to the district of Colorado, and other officers as noted on the 5th day of November, 1895.

And before the Honorable John A. Riner, district judge, the following proceedings were had:

HARRY H. DUDLEY

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF
Lake.

2758.

Money demand.

At this day comes the plaintiff by D. E. Parks, Esq., his attorney, and the defendant by W. H. Bryant, Esq., its attorney, also comes.

And the motion of the plaintiff for a new trial of the issues herein joined coming on now to be heard is argued by counsel and the court

being now fully advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing that the said motion be and the same is hereby overruled.

And thereupon it is ordered by the court that the plaintiff have day until ninety (90) days from this day within which time to file herein a bill of the exceptions reserved by him upon the trial of the issues herein joined.

20 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States in and for said District.

HARRY H. DUDLEY, Plaintiff,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF LAKE COUNTY, } 2758.
Colorado, Defendant. }

Appearances: For plaintiff, Dan'l E. Parks, Esq., H. B. Johnson, Esq. For defendant, W. H. Bryant, Esq.

Bill of Exceptions.

Be it remembered, that on this 7th day of January, A. D. 1896, the same being one of the regular juridical days of the May A. D. 1895 term of said court, the said cause came on for trial before a jury; and thereupon the said plaintiff to sustain the issues on his behalf gave in evidence as follows, that is to say:

GEORGE W. WRIGHT, a witness produced, sworn and examined on behalf of the plaintiff, testified as follows:

Direct examination.

By H. B. JOHNSON, Esq.:

Q. Mr. Wright, you may examine these packages of coupons and state whether you have recently made any computation of the amount that is due upon those coupons, principal and interest. (Hands to witness.)

A. These coupons are well known to me; I have handled them a great many times. I have computed the interest this morning; and the principal is \$23,900, and the interest up to date is \$15,873.85. The total is \$39,773.85 to date.

Q. Do you know who the present owner of these coupons is?

A. Yes, sir.

Q. Who?

A. Harry H. Dudley. The last time I knew where he was, he was in Concord, N. H.

Q. He is the plaintiff in this suit?

A. Yes, sir.

Q. Where does he reside?

A. Well, his home is in Concord, New Hampshire.

Q. Are you personally acquainted with Mr. Dudley?

A. Yes, sir.

Q. Is he a citizen of the United States?

A. Yes, sir; he is a citizen of the United States.

21 Q. Residing at Concord, New Hampshire?

A. Yes, sir.

Q. How long have you been acquainted with the history of this issue of bonds?

A. About ten years; ever since the bonds were first issued.

Q. Do you know to whom the county first sold these bonds?

Defendant objects because it is a matter of record.

The COURT: He may ask him if he knows.

To which ruling of the court the defendant by counsel then and there duly excepted.

A. According to the record, Mr. E. W. Rollins—

Defendant objects for the same reason.

The COURT: Yes, if you know, you may state whether you know or not.

WITNESS: According to Mr. Rollins' ledger and cash book, he bought them from—

Defendant objected to witness testifying as to what the ledger and cash book show.

Q. You may state whether, of your own knowledge, the firm of Rollins & Young, or E. H. Rollins & Sons, originally purchased these bonds from Lake county.

Q. You recollect that they were issued?

A. The bonds were bought by Mr. Rollins personally before the firm was established, and they were partly handled by Mr. Rollins personally, and partly by the old firm of Rollins & Young, which was formed in 1881.

Q. Do you know what he paid for them?

A. I do not.

Defendants object because immaterial.

The COURT: That is not important in this case.

Q. Where does Mr. Rollins now reside?

A. In Boston.

Q. Are you acquainted with the firm of E. H. Rollins & Sons?

A. Yes, sir.

Q. Is that a corporation?

A. Yes, sir.

MR. BRYANT: We object. The proof of a corporation is by certain statutory requirements and not by oral testimony.

WITNESS: I was an officer of the corporation at one time.

22 Q. Under the laws of what State?

Defendant objected because immaterial. Objection overruled. To which ruling of the court the defendant by counsel then and there duly excepted.

A. Under the laws of New Hampshire.

Q. Do I understand you to say that Mr. E. H. Rollins is also a citizen of the State of Massachusetts at the present time?

A. Mr. Edward W. Rollins?

Q. Yes.

A. Yes, sir.

Q. He resides in Boston?

A. Yes, sir.

Cross-examination.

By W. H. BRYANT, Esq.:

Q. Where did Mr. E. W. Rollins reside in 1892?

A. In 1892 he claimed residence here, I believe.

Q. Was he not a citizen of Colorado in 1892?

A. Well, that is a question; he was travelling around so much; I do not remember.

Q. Did he have a house here on Stout and Thirteenth streets, and live here all the time, practically?

A. No, sir.

Q. He had a house here and kept it all the time?

A. Yes, sir.

Q. And was president of the Denver Athletic Club here?

A. Yes, sir.

Q. And voted here?

A. I do not know about his voting here.

Q. Did he not reside here for 10 or 15 years, just prior to that time?

A. Yes, sir.

Q. And had been a citizen of the State?

A. Yes, sir.

Q. And is it not a fact that he did not remove to Boston until last year? To make it his home I mean?

A. I could not say positively; that is, I could not say of my own knowledge.

Q. Now when did you compute the interest on this, Mr. Wright?

A. Today.

Q. And the amount of principal is \$39,793?

A. 39,773.85.

Q. You say that Mr. Harry Dudley is the owner of those?

A. Yes, sir.

Q. How do you know that?

23 A. Well, I was an employee of Rollins & Sons up to March, 1894, and I made the entries of these coupons when they were sold to Mr. Dudley.

Q. Well, when were they sold to him?

A. I could not tell you.

Q. Well, could you tell within a year?

A. No, I could not without seeing the books.

Q. Could you tell within two years?

A. No, sir, I could not.

Q. How do you know that they were sold to him?

A. Because I recollect making the entries at the time.

Q. Did he ever instruct you to purchase them?

A. My recollection is that he did. He says he did not, but my recollection is that he did personally.

Q. Well, now, when did he instruct you to purchase them?

A. I could not tell you.

Q. When did you go to work for Rollins & Company?

A. In August, 1882.

Q. Was it in that year that he told you to purchase them?

A. No, sir.

Q. Was it the next year?

A. My recollection is that it was somewhere in the vicinity of 1888 or 1889, but I did not expect to be called upon, so I did not look it up at all.

Q. Now, what did he say to you?

A. He told me that he had purchased them.

Q. Told you what?

A. He told me that he had bought them, and to make out a statement for them, and I did so, and Mr. Rollins was standing by; that is my recollection.

Q. Told you he had bought them. That is the first conversation you ever had with him about them?

A. No, sir, the negotiations had been pending some time about it.

Q. Where was Mr. Dudley when he told you that?

A. It was on one of his trips here; I have forgotten when.

Q. Do you know how often he has been out here?

A. Two or three times.

Q. Do you know when he first came to Colorado?

A. No, sir.

Q. And the first that he told you about it was that he had purchased them?

A. Yes, sir.

Q. Sir?

A. Yes, sir. Mr. Rollins was standing by, and we had been discussing about it.

Q. Now, you testified before in this case, didn't you?

24 A. Yes, sir.

Q. And you stated in your testimony that time that you received instructions from Mr. Dudley to purchase them, didn't you?

A. No, sir.

Q. Now, are you mistaken on that now?

A. That is a different statement of it.

Q. And that he told you he had purchased them?

A. I was directed to make up a statement of them.

Q. That is all you were directed to do?

A. That is all I had to do.

Q. Then you had nothing to do with the actual purchase of the bonds?

A. No, sir.

Q. So, when you stated before in answer to this question, you gave the following answer: "Well, I received instructions from Mr. Dudley to purchase them; most of their business was done through me." Is that correct or not?

A. I made up my statements. My recollection is that that is the way of it, although he says he does not recollect anything about it.

Q. Says he never told you to buy them?

A. That is what he says, but I have a distinct recollection of the conversation on the matter, and I was directed to make up my statements.

Q. As a matter of fact, all that you did was to make some entries on the books?

A. That is not it exactly; I cut off a lot of coupons and arranged them, and made statements of what they were, etc.

Q. And you think that was in 1888 or 1889?

A. I cannot say what it was; I do not remember.

Q. Did you see Mr. Dudley pay any money for these bonds?

A. I did not.

Q. You have seen his deposition, taken in Concord, have you not?

A. Yes, sir.

Q. In which he says that he never had that conversation with you?

A. Yes, sir.

Q. And never did instruct you to purchase them?

A. Yes, sir.

Q. And never paid a dollar for them?

A. I do not know about that.

Q. Don't remember that statement?

A. He says that he does not recollect telling me. I distinctly recollect the conversation, and I think if I could see him I could convince him he was mistaken.

25 Q. You testified before that he told you to buy them for him?

A. Yes, sir.

Q. Did he ever tell you that?

A. Yes, sir.

Q. Told you to buy them for him?

A. He certainly did.

Q. Did you ever go and see anybody about buying them?

A. Mr. Rollins was standing there buying them for him, and I was told to put them up, directed to prepare them for him on behalf of the Rollins Company and turned them over to him.

Q. Your interpretation of the means requisite to buy coupons for him, is simply to make a few entries on the books?

A. Well, I made both, as I have explained several times it was my business to put those things up, for those people, and the money was passed over to Mr. Rollins and these other parties.

Q. Now, you brought these coupons in the original suit, did you not, the first time this case was tried, did you not?

A. I do not understand what you mean.

Q. That is, you had them in the original envelopes?

A. I had them in the same envelope, yes, sir.

Q. Not in these, were they?

A. No, sir; those have been put up since.

Q. Now, is it not a fact that when you brought these here before in the original envelope, that they were marked on the back in the name of the true owners of the coupons?

A. They might have been originally—

Q. They might have been the names of the original owners?

A. Yes, sir; the names that Mr. Rollins sold the bonds to.

Q. But those names have stayed on them until the trial of this suit in 1893—didn't they?

A. I do not remember.

Q. That is when the first trial was had, is it not?

A. I do not remember.

Q. And the names on the back of the bonds at that time, or the coupons were, among others, the Nassau savings bank; that was on some, was it not?

A. The Nassau savings bank, of what?

Q. The Nassau of New Hampshire.

A. I do not know whether Mr. Rollins purchased them from Mr. Dudley. Mr. Rollins bought them from somebody.

Q. Mr. Stanley's name was on some of them, was it not?

A. I believe he was on some of them.

Q. And David Craig, Jr., J. H. Jagger, Henry D. Hawley and L. C. Hubbard's name was on some of them?

26 A. I recollect Mr. Hubbard's name, but I do not recollect the others.

Q. And the Union Five Cent Savings Bank of Exeter, New Hampshire, was on some of them?

A. They owned some of them at the same time.

Q. Yes; and Susan F. Jones was on some of them?

A. Yes, sir.

Q. So that when these coupons were introduced in evidence in this case on the first trial, the envelopes containing them contained the names of those original owners?

A. Yes, sir; they did.

Q. You had not thought during the four or five years that Mr. Dudley owned them, to put them in another envelope?

A. No, we kept them in that way.

Q. Is it not a fact, Mr. Wright, that Mr. Dudley never paid a dollar for these bonds, and they were simply transferred for the purpose of bringing suit in this court?

A. I do not know. I honestly believe Mr. Dudley owned those bonds.

Q. You did at that time?

A. I did then and I believe now that Mr. Dudley owned them.

Q. Whether he paid a cent for them or not?

A. I do not know that he paid anything for them; it was very rarely that I received any money on behalf of the Rollins Company.

Redirect examination.

By H. B. JOHNSON, Esq. :

Q. As I understand you, Mr. Wright, the names on these envelopes they have alluded to, were simply to indicate the original owners?

A. The original owners of the bonds, so that they could be traced. It was for our convenience that we kept them that way, and not for any such object as Mr. Bryant seems to indicate, or certainly we would not have brought them up here in the original envelopes.

Mr. JOHNSON : I will offer in evidence these coupons.

Mr. BRYANT : We object, because they have not shown that they were cut from the bonds set out in the complaint, or that they are part of the bonds issued which are declared upon in the complaint.

Q. You may examine these bonds, Mr. Wright. (Hands to witness the bonds and withdraws offer temporarily.) Are those the bonds from which these coupons were taken? Are those part of the original bonds referred to by these gentlemen?

27 A. Yes, sir.

Q. And known as the "Court-house bonds"? And these are the coupons sued upon, belonging to those bonds?

A. Yes, sir; I cut most of them myself.

The COURT : What is the date of the bonds?

Mr. BRYANT : The 31st of July, 1880, is the date of this one.

WITNESS : I think there were two dates.

Mr. BRYANT : Some are in December, 1879, or ought to be.

WITNESS : Some are \$100 bonds and some \$500, and are of different dates.

Mr. BRYANT : They have declared in the complaint on these bonds of the 31st of July, 1880, and we object to any other bonds, except those.

Mr. JOHNSON : It is not necessary to go through all those bonds, and coupons, and I offer the bonds and coupons in evidence.

The COURT : There is an objection to the date of the bonds. If those are all of that date alleged in your complaint, it is all right.

Mr. BRYANT : They have alleged in their complaint upon certain bonds of \$500 each, which are dated at that time. Now, this bond which they have shown here, from which some of these coupons were cut, is a \$1,000 bond, and we do not know whether it is the same; whether they cut the coupons from that bond or from the bonds declared upon in the complaint. On the previous trial of this case—there has always been a great deal of uncertainty as to just where these coupons came from. There has been a vast amount of bonds issued by Lake county, and we would like to get them identified so that the county will not be paying this plaintiff for a lot of coupons cut from other bonds, and then have the coupons cut from other bonds brought in and make them pay again. Now this \$1,000 bond is dated the 31st of July, 1880. The bonds which are set forth in the complaint and from which it is claimed that the coupons in this case were cut, is a series of \$500 bonds. We would

like to have them confine their proof to the kind and character of bonds set forth in the complaint; and of course the bonds themselves are not admissible in evidence, I presume, although there is no objection to one going in as a sample of the others, admitting that the one set forth in the complaint is a correct copy. I presume

28 that this complaint would bind them to confine their coupons to the identical bond which is described in the complaint, and prove that they have been cut from those bonds, and I do not think they have done it.

Mr. JOHNSON: The complaint covers all the coupons in suit, and the bond set forth is a sample of the other bonds, of all the bonds. (Reads \$500 bond.) This is a sample of all the bonds. They are of two denominations, \$500 and \$1,000. We identify the coupons and set forth the coupons. Now here are the coupons, Exhibit A to Exhibit F, in which these bonds are described. There cannot be any coupons except those cut from the bonds referred to, and the bonds are identified as Lake county building bonds.

Q. Mr. Wright, state whether the county of Lake ever paid interest on these bonds?

A. Yes, sir.

Mr. BRYANT: I object. It does not make any difference what they have done. They do not show any particular coupons here, and what relates to their coupons is immaterial.

The COURT: I do not think we will go into that. The objection is sustained.

To which ruling of the court the plaintiff by counsel then and there duly excepted.

Mr. JOHNSON: I offer these coupons and bonds in evidence.

Mr. BRYANT: We object to the introduction of the bonds and coupons in evidence for the following reasons: (1) They have never proved or identified either the bonds or the coupons as having been issued by the proper authorities of Lake county; (2) they allege in their complaint that the county of Lake had authority to issue these bonds and complied with the statutes and constitution of Colorado. They have introduced no evidence whatever to prove those allegations; (3) the bonds themselves are not negotiable instruments, in our judgment, and they must prove all the various acts going up to the issuance of them and the power of the county to issue them, independent of any allegations in the complaint; (4) that it appears upon the face of the bonds themselves that they are issued in excess of the constitutional limitation imposed by the constitution of the State of Colorado; and, (5) because there is no proof that the plaintiff in this suit is a *bona fide* holder of these bonds; that is, that he ever paid value for them; and is entitled to any protection which might be given to a *bona fide* holder.

The COURT: These bonds do not recite that they are within the constitutional limitation, as the bonds in the case we had the other day, do they?

29 Mr. BRYANT: No, sir.

Mr. JOHNSON: The court decided that the bonds in the

former trial—the bonds recited compliance with the statute, and the statute is the same and contains the same limitation as the constitution; which brings them directly within that rule.

The COURT: I will overrule Mr. Bryant's objection at this time, and look up the matter before we dispose of it to the jury.

Mr. PARKS: We are prepared with authorities to show that they were issued within the rule. The bond bears the corporate seal of the county, and these are the signatures of the county officers. If necessary I can testify that they were issued by the county.

The following is a sample of said bonds and coupons admitted in evidence, omitting numbers and amounts:

And next following said exhibit is the computation of interest on said bonds by the witness, Wright, which was offered in evidence.

EXHIBIT 1.

No. —.

8—.

UNITED STATES OF AMERICA, *County of Lake, Colorado.*

Know all men by these presents, that the County of Lake, in the State of Colorado, acknowledges itself indebted, and promises to pay to L. E. Roberts or bearer — dollars for value received redeemable at the pleasure of the county after ten years, and absolutely due and payable twenty years from the date hereof at the office of the treasurer of the county of Lake, aforesaid, in the city of Leadville, in said county, with interest at the rate of ten per centum per annum, payable annually on the first day of April of each year, at the office of the county treasurer aforesaid, upon delivery of the coupon hereto attached.

This bond is one of a series of fifty thousand dollars, which the board of county commissioners of said county have issued for the purpose of erecting necessary public buildings, by virtue of and in compliance with a vote of a majority of the qualified voters of said county, at an election duly held on the 7th day of October, A. D. 1879, and under and by virtue of and in compliance with an act of the General Assembly of the State of Colorado, entitled "An act concerning counties, county officers and county government and repealing laws on these subjects" approved March 24th, A. D. 1877, and it is hereby certified that all the provisions of said act have been fully complied with by the proper officers in the issuing of this bond.

In testimony whereof, the Board of County Commissioners of said County of Lake has caused the seal of the said county and the signature of its chairman to be hereunto affixed and the same to be attested by the clerk of the county, at Leadville, this thirty-first day of July, A. D. 1880.

(Signed)

JOSEPH PEARCE,

Chairman Board of County Commissioners.

Attest:

(Signed) JOS. H. WELLS,

County Clerk.

[Seal of Lake County, State of Colorado.]

§—. The County of Lake, in the State of Colorado, §—.

Will pay the bearer one hundred dollars at the office of the treasurer of Lake county, on the first day of April 1900 interest on bond for necessary public buildings.

No. —.

(Signed)

JOS. PEARCE,

Chairman Board of County Commissioners.

Attest: JOS. H. WELLS,
County Clerk.

Part of act entitled An act concerning counties, county officers, and county government, and repealing laws on these subjects.

447. SEC. 20. The board of county commissioners shall not borrow money for the purposes hereinbefore stated, without having first submitted the question of such loan to a vote of the electors of the county, and without a majority of the voters legally qualified to vote and voting on that question shall have voted therefor.

448. SEC. 21. When the county commissioners of any county shall deem it necessary to create an indebtedness for the purpose of erecting necessary public buildings, making or repairing public roads or bridges, they may, by an order entered of record specifying the amount required and the object for which such debt is to be created submit the question to a vote of the people, at a general election; and they shall cause to be posted a notice of such order in some conspicuous place in each voting precinct in the county, for at least thirty days preceding the election, and all persons voting on that question shall vote by separate ballot, whereon is placed the words "For county indebtedness," or "Against county indebtedness;"

31 such ballot to be deposited in a box provided by the county commissioners for that purpose, and no person shall vote on the question of indebtedness unless he shall have the necessary qualifications of an elector as provided by law, and shall have paid a tax upon property assessed to him in such county for the year immediately preceding; and if, upon canvassing the vote (which shall be canvassed in the same manner as the vote for county officers) it shall appear that a majority of all the votes cast are for county indebtedness, then the county commissioners shall be authorized to contract the debt in the name of the county; provided, that the aggregate amount of indebtedness of any county exclusive of debts contracted prior to July first, 1876, in which the assessed valuation of property shall exceed one million of dollars, for all purposes, shall not be in excess of the following ratio, to wit: Counties in which the assessed valuation of property shall exceed five million of dollars, six dollars on each thousand dollars thereof; counties in which the assessed valuation of property shall be less than five millions, and exceed one million of dollars, twelve dollars on each thousand dollars thereof.

449. SEC. 22. The county commissioners, when authorized as provided in section twenty-one of this act, shall make and issue

coupon bonds of the county, not exceeding the amounts specified in the preceding section, in counties which have an assessed property valuation exceeding one million of dollars, payable at the pleasure of the county, ten years after the date of their issuance, but absolutely due and payable twenty years after such date, bearing interest at the rate of not exceeding ten per cent. per annum, from their date until paid. Said interest payable on the first day of April of each year, and the principal, when due, at the office of the county treasurer of the county, and the county commissioners shall prescribe the form of said bonds, and the coupons thereto; and to provide for the annual interest accruing on the bonds, they shall levy annually a sufficient tax to fully discharge such interest; and for the ultimate redemption of such bonds, they shall levy annually, after ten years from the date of such issuance, such tax upon all taxable property in their county as shall create a yearly fund equal to ten per cent. of the whole amount of such bonds issued; and all taxes for interest on, and the redemption of such bonds shall be paid in cash only, and shall be kept by the county treasurer as a special fund, to be used in the payment of interest on and redemption of such bonds only; such taxes to be levied and collected as other taxes.

450. SEC. 23. When it shall appear to the board of county commissioners, upon examination of the books and accounts of the county treasurer, that there are sufficient funds in his hands
32 to the credit of the redemption fund to pay in full the principal and accrued interest of any of such bonds, it shall be the duty of such board immediately to call in and pay as many of such bonds and accrued interest thereon as the funds ascertained to be on hand will liquidate, and said board shall thereupon cancel such redeemed bonds, and all uncanceled interest coupons issued therewith. The bonds shall be called in and paid in the order of their issuance, as nearly as may be practicable, and when it is desired to redeem any of such bonds by said board, they shall cause to be published for thirty days, in some newspaper at or nearest the county-seat of the county, a notice that certain county bonds (specifying the numbers and amounts) will be paid upon presentation, and at the expiration of such thirty days said bonds shall cease to bear interest.

451. SEC. 24. The bonds issued as heretofore provided, shall be signed by the chairman of the board of county commissioners, and attested by the clerk of the county, and bear the seal of the county upon each bond, and shall be numbered and registered in a book kept for that purpose, in the order in which they are issued. Each bond shall state upon its face the amount for which the same is issued, to whom issued, and the date of its issuance; but no bond shall be of a less denomination than fifty dollars, and, if issued for a greater amount, then for some multiple of that sum; and the aggregate amount of such bonds issued shall not exceed the sum entered of record by the board of county commissioners, as required in section 21 of this act, and any bond issued in excess of said sum shall be null and void.

452. SEC. 25. The board of county commissioners shall have the right to sell any of such bonds, but no bond shall be sold unless for cash, and not then at a discount of more than 15 per cent. on its par value. The money arising from the sale of such bonds shall be forthwith used for the objects for which the debt was created, and for no other purpose whatever. When any such bonds or any coupons shall be redeemed, the board of county commissioners shall, in the presence of the clerk of said board or his deputy, cancel such bonds or coupons by writing the word "cancelled" on the face of such bonds or coupons, and said board shall make a record of the proceedings, stating what bonds or coupons were cancelled.

Indorsement: No. —. Public building bond. Lake county, Colorado. \$1,000. \$500. Interest ten per cent. per annum, payable April 1st, at Leadville. Bonds redeemable after July 31, 1890, and due July 31, 1900.

EXHIBIT 2.

Lake County Court-house Bond Coupons.

30

DENVER, COLO., January 7, 1896.

BOARD OF COUNTY COMMISSIONERS OF COUNTY OF			
Face.	Interest.	Total.	
1,500	1,465	2,965	10 %
1,100	1,074.33	2,174.33	10 %
3,000	2,630	5,630	10 %
1,100	964.33	2,064.33	10 %
2,240	1,708.66	3,908.66	10 %
1,100	854.33	1,954.33	10 %
3,000	2,639	6,539	10 %
1,100	744.33	1,844.33	10 %
3,000	1,799.20	6,699.20	8 %
1,100	567.47	1,667.47	8 %
3,000	1,487.20	5,387.20	8 %
\$25,960	\$15,873.85	\$39,773.85	

Computation of witness George W. Wright, of sum of money due on plaintiff's coupons put in evidence.

34 DANIEL E. PARKS, a witness produced on behalf of the plaintiff, solemnly affirmed and testified as follows :

Direct examination.

By H. B. JOHNSON, Esq. :

Mr. BRYANT: May a witness affirm, instead of swearing, in the Federal court ?

The COURT: Yes ; he may affirm.

Mr. BRYANT: I object to his affirming.

Objection overruled, and defendant by counsel duly excepts.

Q. You may state where you resided at the date of the issue of those bonds ?

A. Lake county, Colorado.

Q. You may state whether you are acquainted with the members of the board of county officers—acquainted with their signatures, whose names purport to be signed to those bonds and coupons ?

Defendant objected.

Q. And the seal of the county ?

Mr. BRYANT: I object, because not the best evidence.

Objection overruled. To which ruling of the court the defendant by counsel then and there duly excepted.

A. Yes, sir.

Q. You may state whether those bonds bear upon their face the genuine signatures of the officers of the county.

Defendant objected for the same reason last given. Objection overruled. To which ruling of the court the defendant by counsel then and there duly excepted.

A. Yes, sir ; the one that I have before me has the original signature of Joseph Pierce, chairman of the board, and is attested by Joseph H. Wells, county clerk, by E. T. Wolverton, deputy. That is Mr. Wolverton's and Mr. Pierce's handwriting, to the best of my knowledge and acquaintance with their writing. The coupon is signed by Mr. Pierce and in what I should judge to be his original handwriting, from what I know. As to the balance of the bonds, I have not examined them critically. If you desire my testimony as to each individual bond, I will examine the bonds. This bond is—

Q. From your examination of the bonds, were they all signed alike, and the coupons ?

35 A. I do not know whether they are or not. A portion of them may be signed by Mr. Joseph H. Wells himself. This is signed by Mr. Wolverton, his deputy.

Q. From your knowledge of this issue of bonds, can you state that they were issued and signed by the officers of the county at that time ?

A. Yes, sir ; I think so.

Cross-examination.

By W. H. BRYANT, Esq. :

Q. Did you examine any of these coupons, Mr. Parks?

A. I have from first to last, but you must call my attention to them.

Q. Well, I will show you one of them. Is that the original signature of the officer, or just a lithograph?

A. I am inclined to think that is a lithograph, although I do not know. They are signed by Joseph Pearcel, I should judge, by his original signature, but possibly this is a lithograph. I am speaking of the bonds particularly.

Q. Just compare the coupons with the bonds and see if they are all identical with the lithograph—both of Pierce and Wells?

A. I am inclined to think those are lithograph signatures, but I have my doubts about it. They look to me like lithograph signatures on the coupons, but I am speaking of the original bonds—they are original signatures.

Q. You knew Mr. Wells?

A. I was personally acquainted with him for years. He was county clerk when I was county attorney up there.

Q. And you knew both their signatures, did you?

A. I knew Mr. Wells' signature as well as Mr. Wolverton's, his deputy, and Mr. Pierce's. I was acquainted with this man, Roberts, whose name appears in the bonds, who was the contractor who built the court-house. I desire to add right there that I understand Mr. Roberts is now a citizen of another State and I have not seen him for years.

Mr. BRYANT: I move that that be stricken out as immaterial, irrelevant and incompetent, what he understands.

The COURT: There is no occasion for that.

Mr. JOHNSON: I offer to show by witnesses that he knows it, and I think he does, that these bonds were issued and paid directly to Mr. Roberts for building the court-house, he being a contractor, and that he sold them.

The COURT: You may ask that.

36 Redirect examination.

By H. B. JOHNSON, Esq. :

Q. You may state whether or not those bonds were issued and delivered to Mr. Roberts for building the court-house.

Defendant objected because immaterial, improper and irrelevant, and not being the best evidence.

Objection overruled. To which ruling of the court the defendant by counsel then and there duly excepted.

A. Well, I will preface that by saying—

Q. No; answer the question, and then explain. You know whether you can answer the question or not.

A. I believe that was so, but I was not attorney for the county at that time, and therefore was not in a position to know positively.

Mr. BRYANT: I move that that be stricken out.

Objection overruled. To which ruling of the court the defendant by counsel then and there duly excepted.

Q. You may state whether from your knowledge, Mr. Roberts was the contractor who built the court-house.

A. Yes, sir.

Q. The bonds on their face are made payable to him, are they not?

A. This one is to L. E. Roberts; they are all alike; yes, sir. That has the county seal also.

Recross-examination.

By W. H. BRYANT, Esq.:

Q. Do you say they are all like that?

A. No; I do not say that they are all like that.

Q. Don't you know as a matter of fact, that they were not all issued to Mr. Roberts?

A. I have not examined them, and cannot say.

Q. How do you know Mr. Roberts was the contractor?

A. I know it from the fact that I was attorney of the county from about the 11th day of February, 1879, to the 15th day of April, 1880, when I resigned; I was reappointed the 23rd day of April, 1883, and served until the 1st of January, 1890; and I had more or less to do with the county business, and knew Mr. Roberts personally, and had my office close by and saw the court-house going up and saw the work and know all about it.

37 Mr. BRYANT: I move that the testimony be stricken out because not the best evidence of the fact that Mr. Roberts was the contractor.

Objection overruled. To which ruling of the court the defendant by counsel then and there duly excepted.

Mr. BRYANT: I should like to renew my objection to the coupons, on the ground that according to the testimony of Mr. Parks they are lithographed signatures of the officers of the county, and that none of them have been signed by the officers of the county.

Objection overruled. To which ruling of the court the defendant by counsel then and there duly excepted.

Mr. JOHNSON: I offer in evidence five bills of sale of these coupons and bonds, to Mr. Dudley.

Mr. BRYANT: I object to them, because they are not identified, the signatures or the execution of them. There is no evidence to show.

The COURT: Who are they executed by?

Mr. BRYANT: By various parties. Here is one by Joseph Standley, and here is one by Susan F. Jones, here is one (—) G. P. Bissell & Company, one by the Five Cent savings bank, Exeter. N. H., and here is one by the National savings bank. They are not identified.

Mr. PARKS: I would state to the court that I was served yesterday with notice from Mr. Bryant to produce these papers, and I have produced them. And the testimony of Mr. Dudley has been taken by the defendant on two occasions, and these papers have been identified by the testimony of Mr. Dudley in his deposition, and Mr. Dudley has stated that he would produce them here with his deposition. He has done so. They extorted from him the promise that he would produce them in connection with the deposition. They are here for that purpose, and we offer them in evidence in connection with the deposition had on notice to the other side.

Mr. JOHNSON: They are all in due form, under the seals of the corporations.

The COURT: We will see whether Mr. Dudley's deposition will identify them.

Mr. JOHNSON: We think it is sufficient to produce them here as the property of Mr. Dudley.

38 GEORGE W. WRIGHT recalled for further examination on behalf of the plaintiff testified as follows:

Direct examination.

By H. B. JOHNSON, Esq.:

Q. Are you acquainted with Mr. Joseph Standley?

A. Yes, sir.

Q. Do you know his signature?

A. Yes, sir.

Q. Is this his signature?

A. That is his signature.

Q. Do you know Susan F. Jones?

A. I do.

Q. Is that her signature?

A. Yes, sir.

Mr. BRYANT: That is not proof, and he is not competent to answer that question, from the mere fact that he knows these parties.

The COURT: He says he knows the signatures.

Q. Do you know the parties and know the signatures, Mr. Witness?

A. Yes, sir; I have known Standley for ten years, probably; and Mrs. Jones for five years; and am thoroughly acquainted with her signature and handwriting.

Q. Do you know anything about G. P. Bissell & Company?

A. I know the firm of Rollins & Company; had a great deal of business to do with them.

Q. You may examine those three bills of sale, the signatures of them.

A. This is one signed by the Union Five Cent savings bank, by its treasurer, Sarah C. Clark. I know Mrs. Clark's signature very well. While I was secretary and treasurer of the Rollins Investment Company I carried on extensive correspondence with her, and she

owned a great many securities. As to the Nassau savings bank, I know the signature of the treasurer, and of this other signed by David Crary, Jr., Jagger, and Hawley, and Hubbard; I know Mr. Hawley's signature and Mr. Crary's. I do not know the other.

Q. So those are the signatures of the officers of those corporations?

A. Yes, sir.

The Court: You may offer them.

To which ruling of the court the defendant by counsel then and there duly excepted.

39 Said bills of sale so received in evidence are in words and figures following:

EXHIBIT 3.

For value received I do hereby sell, assign, transfer and set over unto Harry H. Dudley of Concord, New Hampshire, the following described building bonds of the county of Lake, Colorado, viz: bonds of the denomination of \$1,000 each numbered from numbers fifty-five (55) to sixty-four (64) both numbers inclusive, and bonds of the denomination of \$500.00 each and numbered from 65 to 66 both numbers inclusive, said bonds being issued by the said county of Lake in A. D. 1880 by the Board of County Commissioners of the said County of Lake through its proper officers, bearing interest at the rate of 10 per cent. per annum and payable at the option of said county ten years after date but absolutely due and payable twenty years after date.

Dated December 5th, A. D. 1888.

SUSAN F. JONES,

Executrix of the Estate of Walter H. Jones, Deceased.

Indorsed: 55 to 64, 1,000. 65 to 66, 500. Exhibit 3.

EXHIBIT 4.

Know all men by these presents that we, David Creary Jr. of Hartford, J. H. Jagger of Hebron, Henry D. Hawley of Farmington and L. C. Hubbard of Berlin, all in the State of Connecticut, in consideration of the sum of five thousand three hundred eighty and $\frac{66}{100}$ dollars paid by Harry H. Dudley of Concord in the county of Merrimack and State of New Hampshire, the receipt whereof is hereby acknowledged, do hereby grant, sell, transfer, and deliver unto the said Harry H. Dudley the following goods and chattels, namely, seven bonds known as Lake county, Colorado public building bonds and described as follows: to wit, three bonds of the denomination of one thousand dollars each, numbered 80, 81 and 82, and four bonds of the denomination of five hundred dollars each, numbered 83, 84, 85 and 86; all of said bonds being due on July 31, 1900 and bearing interest at the rate of ten per centum per annum, payable annually.

Together with all the interest coupons attached to said bonds, the

first coupons on each bond being numbered No. 5 and the subsequent coupons of each bond being numbered consecutively up to and including No. 21.

To have and to hold all and singular the said goods and chattels to the said Harry H. Dudley and his executors, administrators, and assigns, to their own use and behoof forever, and we hereby covenant with the grantee that we are the lawful owners of the said goods and chattels; that they are free from all incumbrances, that we have good right to sell the same as aforesaid; and that we will warrant and defend the same against the lawful claims and demands of all persons and we have put the grantee in possession of the said property by delivering to him this deed in the name of the whole.

In witness whereof we the said David Crary, J. H. Jagger, Henry D. Hawley and L. C. Hubbard have hereunto set our hands and seal this 11th day of February in the year A. D. one thousand eight hundred and eighty-five.

DAVID CRARY, JR.

J. H. JAGGER.

HENRY D. HAWLEY.

L. C. HUBBARD.

[SEAL.]
[SEAL.]
[SEAL.]
[SEAL.]

Signed, sealed, and delivered in presence of—

ALBERT H. OLINSKA.

IRVING W. HAVENS.

Indorsed: No. 80, 81, 82, 1,000. 83, 84, 85, 86, 500. G. P. Bis-
sell & Co. to Harry H. Dudley. Bill of sale of personal property.

EXHIBIT 5.

Know all men by these presents that the Nashua Savings Bank, of Nashua, in the county of Hillsborough and State of New Hampshire, a corporation duly organized under the laws of the State of New Hampshire, in consideration of the sum of eleven thousand eight hundred sixty-nine and $\frac{4}{100}$ dollars, paid by Harry H. Dudley of Concord, in the county of Merrimack and State aforesaid, the receipt whereof is hereby acknowledged, do hereby grant, sell, transfer and deliver unto the said Harry H. Dudley the following goods and chattels, namely, twenty unregistered coupon bonds of the issue known as Lake County, Colorado, public building bonds, numbered consecutively from No. 92 to No. 111, both inclusive, due July 31, 1900, of the denomination of five hundred dollars each and bearing interest at the rate of ten per centum per annum, payable annually.

Together with all the interest coupons originally attached to said bonds and unpaid, the first being numbered No. 4 and the subsequent coupons being numbered consecutively to and including No. 21.

To have and to hold all and singular the said goods and chattels to the said Harry H. Dudley and his executors, administrators and

41 assigns, to their own use and behoof forever. And said grantor hereby covenants with the grantee that it is the lawful owner of the said goods and chattels; that they are free from all incumbrances, that it has good right to sell the same as aforesaid; and that it will warrant and defend the same against the lawful claims and demands of all persons and it has put the grantee in possession of said property by delivering to him this deed in the name of the whole.

In witness whereof, the said Nashua savings bank by its treasurer duly authorized has hereunto set its hand and seal this 20th day of March, in the year A. D. one thousand eight hundred and eighty-five.

NASHUA SAVINGS BANK, [SEAL.]
By VIRGIL C. GILMAN, *Treas.*

Signed, sealed and delivered in the presence of—

The words "originally" and "unpaid" being inserted before the signing hereof—

G. F. ANDREWS.

W. T. BAILEY.

Indorsed: 92 to 111. Nashua savings bank to Harry H. Dudley.
Bill of sale of personal property.

EXHIBIT 6.

Know all men by these presents that the Union Five Cents Saving Bank of Exeter, in the county of Rockingham and State of New Hampshire, a corporation duly organized under the laws of said State, in consideration of the sum of ten thousand six hundred ninety-five dollars (\$10,695) paid by Harry G. Dudley of Concord in the county of Merrimack and State aforesaid the receipt whereof is hereby acknowledged, do hereby grant, sell, transfer and deliver unto the said Harry H. Dudley the following goods and chattels, namely, eighteen unregistered coupon bonds of the issue known as Lake County, Colorado public building bonds and numbered consecutively from No. 112 to No. 129 both said numbers inclusive, due July 21, 1900, of the denomination of five hundred dollars each, and bearing interest at the rate of ten per cent. per annum, payable annually together with all the interest coupons originally attached to said bonds and unpaid, the first of said coupons being numbered No. 4 and the subsequent coupons being numbered consecutively to and including No. 21.

To have and to hold all and singular the said goods and chattels to the said Harry H. Dudley and his executors, administrators and assigns, to their own use and behoof forever. And said grantor hereby covenants with the grantee that it is the lawful owner of the said goods and chattels; that they are free from all incumbrances, that it has good right to sell the same as aforesaid; and that it will warrant and defend the same against the lawful claims and demands of all persons, and it has put the said grantee

in possession of said property by delivering to him this deed in the name of the whole.

In witness whereof the said Union Five Cents — bank by its treasurer duly authorized has hereunto set its hand and seal this 25th day of March in the year A. D. one thousand eight hundred and eighty-five.

UNION FIVE CENTS SAVING [SEAL.]
BANK,

By its treasurer, SARAH C. CLARK.

Signed, sealed and delivered in presence of—

The words "originally" and "and unpaid" being interlined before the signing hereof—

HARRIET FRENCH.

Indorsed: For Lake Co. bds. 112 to 129. The Union Five Cents saving bank, Exeter, N. H., to Harry H. Dudley. Bill of sale of personal property.

EXHIBIT 7.

For value received I do hereby sell, assign, transfer and set over unto Harry H. Dudley of Concord New Hampshire the coupons cut from Lake County public building bonds Nos. 55 to 64 inclusive of one thousand dollars bonds and Nos. 65 & 66 of five hundred dollars bonds, viz: those falling due and payable in the years 1886, 1887, 1888, 1889, 1890 and 1891. And also coupons amounting to \$600 cut from bonds Nos. 55, 56, 57, 58, 59, 60 falling due in the year 1884.

In testimony whereof witness my hand.

SUSAN F. JONES.

EXHIBIT 8.

DENVER, COLO., Dec. 10th, 1884.

Know all men by these presents, that I, Joseph Standley of Denver, in the county of Arapahoe and State of Colorado, in consideration of the sum of fifteen thousand eight hundred eighty seven $\frac{50}{100}$ dollars paid by Harry H. Dudley of Concord in the county of Merrimack and State of New Hampshire, the receipt of which is hereby acknowledged, do hereby grant, sell, transfer and deliver unto the said Harry H. Dudley the following goods and
43 chattels, namely, eighteen unregistered coupon bonds known as Lake County, Colorado public building bonds, numbered and described as follows, to wit, twelve bonds of the denomination of one thousand dollars each numbered from No. 68 to 79 both inclusive and six bonds of the denomination of five hundred dollars each No. 67 and from 87 to 91 both inclusive all of said bonds bearing interest at the rate of ten per centum per annum payable annually and said bonds being due on July 31st, 1900, together with all interest coupons attached, to have and to hold all and singular the said goods and chattels to the said Harry H. Dudley and his

heirs, executors, administrators and assigns, to their own use and behoof forever.

JOSEPH STANDLEY. [SEAL].

Witness:

J. W. GAYNOR.

Indorsed: 1,000. 68 to 79 inclusive. 500. 67, 87 to 91 inclusive.

Cross-examination.

By W. H. BRYANT, Esq.:

Q. You say you know Mr. Crary's signature?

A. Yes, sir.

Q. How does he spell his name?

A. C-r-a-r-y.

Q. Is not that "Craig"? You must be mixed up, if you are familiar with his signature?

A. That is "Crary."

Q. Mr. Dudley is mistaken when he says it is "Craig," is he?

A. Yes, sir. It is "Crary."

Q. Where does Mr. Standley reside?

A. He resides in Denver.

Q. He is a citizen of Colorado, is he not?

A. Yes, sir.

Q. And has been for a great many years?

A. Yes, sir.

Q. How long have you known him?

A. About 10 years.

Q. And he has been a citizen of Colorado all that time?

A. Yes, sir.

Q. Mrs. Jones is a citizen of Colorado, is she not?

A. Yes, sir.

Q. How long have you known her?

A. Four or five years. I knew her when her husband died, or shortly after her husband died; she came to Denver to transact some business.

Q. Her husband was a citizen of Colorado?

A. Yes, sir.

44 Plaintiff objected because not cross-examination, and moved to have the testimony stricken out.

The Court: I will not strike it now. If you want to object to testimony, you must do it at the time.

To which ruling of the court the plaintiff by counsel then and there duly excepted.

Mr. BRYANT: We object to all these bills of sale as not being sufficiently proved, and we object especially to this bill of sale of Susan F. Jones, executrix of the estate of Walter H. Jones, deceased, because there is no authority shown here for her to execute an instrument of that kind; she being executrix she would have to have the authority of the county court or probate court of the county wherever she resided, to dispose of this personal property, and there is no such

authority shown. There is nothing here to show that she was the executrix of the estate.

Objection overruled. To which ruling of the court the defendant by counsel then and there duly excepted.

Mr. PARKS: We now call the attention of your honor and the jury to the deposition of E. W. Rollins, which I will read.

Said deposition so offered is in words and figures following:

(Caption.)

"EDWARD W. ROLLINS, a witness produced, sworn and examined on the part of the plaintiff herein, by and before Mr. Thomas H. Reynolds, a notary public within and for the county of Arapahoe, and State of Colorado, at his office in the city of Denver, in said county, testified as follows, to wit:

Direct examination.

By Mr. PARKS:

Q. State your name, age and residence.

A. Edward W. Rollins; forty-four years; Denver, Colorado.

Q. Are you acquainted with the parties to this suit?

A. Yes.

Q. Do you recollect the transaction relative to the purchase by you or your firm of the Lake County public building bonds, involved in this litigation?

A. Yes; that is, a portion of them.

Q. State what you know, as briefly as you can, about the purchase of these bonds; who purchased them, the price of them, etc.

A. I was doing business at the time the bonds were issued, as E. W. Rollins, and I bought Lake County public building bonds Nos. 67 and 83 to 129 inclusive, being 48 bonds of \$500 each, 45 amounting to \$24,000, and bonds Nos. 68 to 83 inclusive, being 15 bonds of \$1,000 each, amounting to \$15,000, and it is my recollection that I paid 92½ cents for them.

Q. When was that?

A. At the time the bonds were issued.

Q. Do you recollect when?

A. I bought them direct from the county.

Q. Do you recollect the date?

A. No; I do not know. It was when the bonds were issued, as I bought them right from the county, or the contractor. It was the contractor, now I come to think of it.

Q. What did you do with the bonds?

A. I sold them.

Q. To others?

A. Yes.

Q. For value?

A. Yes.

Q. At the time you purchased the bonds were the coupons all attached?

A. Yes.

Q. None of them were cut off?

A. No.

Q. None of them due?

A. None of them due.

Q. Who is the present owner of the bonds and overdue coupons?

A. Mr. H. H. Dudley.

Q. The plaintiff in this suit?

A. Yes.

Q. Was he such owner at the time of the commencement of this suit?

A. I think he was, yes.

Cross-examination.

By Mr. BRYANT:

Q. When did Mr. Dudley purchase the bonds?

A. I don't know exactly, but a number of years ago.

Q. Do you know how he purchased them?

A. No.

Q. Who did he purchase them from?

A. That I don't know.

Q. How do you know that he purchased them?

A. Because he sent the bonds to us and gave us the proper bills of sale to substantiate his claim.

Q. Do you know when he sent the bonds to you?

A. Years ago.

Q. For what purpose did he send them to you?

A. To bring suit on them.

46 Q. Have you got the letter that he sent them with?

A. No.

Q. Do you not file these letters that you receive?

A. Yes; generally.

Q. Do you not think that you have that letter on file?

A. Might have.

Q. Can you find it and attach it to this deposition?

A. Think I can.

Q. Do you know how Mr. Dudley purchased them?

A. No.

Q. Do you know whether they are owned by him individually or not?

A. I suppose they are.

Q. Do you know where he purchased them?

A. He purchased them of the various owners.

Q. Some were in the East?

A. Yes.

Q. The bonds were sold, some of them, to some trust company in Providence, were they not?

A. Not by me.

Q. To some savings (banks) there?

A. No.

Q. Mr. Dudley was at that time connected with you, or your firm or company?

A. Yes.

Q. And he is the present secretary of E. H. Rollins & Sons?

A. No.

Q. Or treasurer?

A. No.

Q. What office does he hold?

A. Director.

Q. Simply a director? Is it not a fact that he simply holds these bonds as trustee for the firm of E. H. Rollins & Sons?

A. No.

Q. Or for the real owners?

A. That I don't know anything about.

Q. Do you know whether he holds them simply for the purpose of collection?

A. No.

Q. You say he sent you bill of sale with these bonds?

A. Yes.

Q. Have you got that?

A. No, but it can be produced if you want it.

Q. Will you produce it and attach it to your deposition?

A. Yes.

Q. You say you purchased these bonds at the time they were issued?

A. Yes.

47 Q. Do you know whether it was the original series or a re-issue of them that you purchased?

Question objected to by Mr. Parks on the ground that it is based on the supposition that there was some other issue.

Q. You purchased the original issue? You purchased the bonds as they were issued?

A. I purchased the bonds the county issued to pay for their building.

Q. Were you living in Leadville at that time?

A. No, I lived here.

Q. Did you purchase them yourself direct or through an agent?

A. I went up there and made the negotiations personally. I do not recollect whether I took the bonds in Leadville or whether they were delivered to me here.

Q. You investigated the issue of bonds at that time?

A. Yes.

Q. And believed they were legal and bought them?

A. Yes.

Q. You made as full an investigation as you were able at that time?

A. Yes.

Q. How long did you or your firm hold the bonds?

A. A short time, I sold them just as soon as I could.

Q. Within what time, do you know?

A. I should say I sold them within ninety days.

Q. Within ninety days after you purchased them?

A. Yes.

Q. Do you know to whom you sold them?

A. I do not recollect, no.

Q. Do you know how the first coupons that were paid, were paid?
Through your office?

A. Probably not.

Q. Were they not sent to you for collection?

A. I do not think they were.

Q. When did you next hear of the bonds?

A. We used to have some of the coupons for collection?

Q. Some of these coupons?

A. Yes.

Q. When did you next see them, if you know?

A. I think I next saw them when the suit was brought.

Q. When they were sent to you by Mr. Dudley?

A. Yes.

Q. He sent them to you by registered letter, or how?

A. I do not recollect.

48 Q. Are you positive that he mailed them or sent them to
you?

A. Yes.

Q. Together with a bill of sale?

A. No.

Q. When did you get the bill of sale?

A. I don't know.

Q. Was it before or after the suit was brought?

A. I do not know.

Q. Was it lately, within the last six months?

A. I do not know.

Q. Would you say it was or was not?

A. I would not say anything at all.

Q. What is your best recollection?

A. That is something I know nothing about.

Q. You do not know when you got that?

A. I do not know when we got it; before the suit was brought.

Q. You say you got the bill of sale before the suit was brought?

A. No, I say we got the bonds before the suit was brought.

Q. You knew at that time that Mr. Dudley was the owner?

A. Yes.

Q. The only information you had was derived from his letter accompanying the bonds, stating that he was the owner of the bonds?

A. Yes.

Q. And you will try and get that letter and attach it to your deposition?

A. I do not know that he said in his letter that he owned the bonds. He simply sent them to us to be sued upon.

Q. Did he say anything in the letter as to who did own them?

A. No.

Q. Did he say anything about the owner of the bonds?

A. No.

Q. The bonds are payable to bearer?

A. To Roberts or bearer.

Q. He simply sent them to you with a request that suit be brought on them?

A. Yes.

Q. Did he say in his name?

A. Yes.

Q. Did he authorize you to employ attorneys?

A. Yes.

Q. And make arrangements to pay them?

A. Yes.

Q. Do you know whether he did pay them or not?

49 A. Yes.

Q. Do you know whether your firm paid the attorneys or not?

A. No.

Q. Have you?

A. No.

Q. You have paid none of the expenses of the litigation?

A. No.

Q. And the firm of E. H. Rollins & Sons, or any of its predecessors, have paid none of the expenses?

A. None.

Q. Did Mr. Dudley say anything about the expenses of the litigation?

A. He asked us to arrange with counsel to bring the suits.

(A.) And you employed Mr. Parks and Mr. Johnson?

A. Yes.

Q. Did you arrange with them about fees?

A. Yes.

Q. And told them that Mr. Dudley would pay them?

A. Yes.

Q. Told them that Mr. Dudley was responsible?

Q. Yes; they know Mr. Dudley.

Q. When would you give it as your best recollection as to when that bill of sale of these bonds came from Mr. Dudley?

A. I do not recollect.

Q. Well, would you say it was within the past year?

A. I do not recollect.

Q. Would not your best recollection be that it was within the past year?

A. No; I would not say definitely.

Q. Do you know what the bill of sale shows, who he purchased them from?

A. Yes; the bill of sale shows from whom he purchased them.

Q. Have you got that here in the office?

A. No.

Q. Do you know where it is?

A. Mr. Dudley has it.

Q. He still has the bill of sale?

A. Yes.

Q. Did you send it back to him?

A. Yes.

Q. When did you send it back to him?

A. I have forgotten how long ago that was. I think it was sent back to him. He sent for it when he wanted to make some deposition.

Q. Here within the past two or three months?

50

A. Yes.

Q. Did you write him a let-er at that time?

Objected to by Mr. Parks as immaterial.

(Q.) We wrote him a letter enclosing it.

Q. Is a copy of that letter in the office?

A. That I don't know.

Q. I wish you would find it if you have it and attach it to your deposition.

Objected to by Mr. Parks.

Q. Did you get a letter from Mr. Dudley requesting it to be sent?

Objected to by Mr. Parks as immaterial, incompetent and not proper cross-examination.

A. I think we did.

Q. Is that letter filed in the office?

Objected to by Mr. Parks.

Q. We would like to get a copy of that letter.

Objected to by Mr. Parks.

Redirect examination :

Q. What is the citizenship and residence of Mr. Dudley?

A. He is a citizen of the State of New Hampshire.

It is hereby stipulated and agreed by and between the parties plaintiff and defendant in the cause entitled in the foregoing deposition, as follows :

First. That said deposition was taken by and before Mr. Thomas H. Reynolds, a notary public within and for the county of Arapahoe and State of Colorado, on the 5th day of January, A. D. 1895, at his office in the city of Denver in said county of Arapahoe, upon due notice to the defendant's attorneys.

Second. That upon such examination the plaintiff appeared by Mr. D. E. Parks one of his attorney, and the defendant by Mr. W. H. Bryant, one of its attorneys.

Third. That the usual oath was administered to said Edward W. Rollins as a witness, that the evidence he should give in said cause as such witness, should be the truth, the whole truth and nothing but the truth, and thereupon the testimony and evidence of said Edward W. Rollins, as a witness, was had and taken as appears in the said deposition.

51 Fourth. That said deposition may be used and read in this the said cause, upon the trial thereof before said court, the said parties reserving to themselves such objections to the relevancy and competency of the evidence adduced, and such other objections not relating to the form and manner of taking such deposition, as they may choose to make thereto on said trial.

Dated this 27th day of December, A. D. 1895.

DAN'L E. PARKS, *Plaintiff's Attorney.*

THOMAS, HARTZELL, BRYANT & LEE,
Defendant's Attorney."

Indorsed : No. 2758. In the circuit court. Harry H. Dudley vs. The Board of County Commissioners of the County of Lake, Colorado. Deposition of Mr. Edward W. Rollins. Filed January 7th, 1896. Robert Bailey, clerk, by Charles W. Bishop, deputy clerk. D. E. Parks, plaintiff's attorney, Denver, Colo.

Mr. PARKS : If the court please I find one of the powers of attorney is not here ; I have overlooked it in the papers in my office, but I will get it, and that I want to supply.

The COURT : They may go in with them provided they are all right.

Plaintiff rests.

Mr. BRYANT : We now ask the court that the jury be instructed to return a verdict for the defendant, upon the ground that the plaintiff has failed to prove his case as alleged in the complaint, and for the ground particularly stated in the objection to the introduction of these coupons and bonds in evidence. I think there were some four or five grounds, which I set forth in my objection at that time, and all of which I would like to have renewed and made a part of this objection. And also on the additional ground that under the statute of 1888, the Federal court is not given jurisdiction of the suits brought by assignees, except to foreign bills of exchange, unless the assignor has a right to bring a suit himself, and that they must allege and prove that the assignor or assignors of these bonds had a right to bring such a suit. Now I make that point, and I will be frank with your honor. Judge Hallett has ruled on that identical proposition and has held that the exception in the statute relates not only to foreign bills of exchange but also to negotiable instruments payable to bearer and issued by a corporation, which would bring the provisions of the exception within the terms

52 of these coupons, I presume, if a county is a corporation.

Judge Hallett held that way, but this point has never been passed upon by the Supreme Court of the United States or the circuit court of appeals. I believe there have been some different rulings announced in the other circuits. We make this for the purpose of preserving a record, but if your honor would like to hear arguments upon it we will produce such as we have been able to find.

The COURT : Your prayer for an instruction, Mr. Bryant, will be denied at this time. You may proceed with the case.

Mr. PARKS: As to the other question that he raises, I have the authorities that he refers to.

The COURT: I do not care for them. I will not pass upon that now.

To which denial by the court of the motion for a verdict for defendant, the defendant by counsel then and there duly excepted.

And thereupon the defendant to maintain the issues on its behalf, gave in evidence as follows, that is to say:

Mr. BRYANT: We have some depositions here, but I desire to introduce the sworn replication of plaintiff in this case, which admits the assessed valuation of the county for 1879 and 1880.

Mr. PARKS: That is all right.

Mr. BRYANT: Then it is admitted that the assessed valuation of the taxable property of Lake county for the year 1879 was \$3,485,628, and for the year 1880 it was \$11,126,489, for the year beginning the 1st of May, 1879, and for the year beginning the 1st of May, 1880. That is the way the assessor was required to return it. Now, I would like to introduce in evidence the depositions of Mr. Dudley, which have been taken.

Mr. PARKS: The defendant through its attorneys took the deposition of Mr. Dudley, which he now holds in his hand, and not being satisfied with that, took it a second time. I do not know whether they are bound to rely on the first deposition or not, but I desire to call the court's attention to that fact.

The COURT: You may rely on both. There may be some matters additional in the two depositions.

Mr. BRYANT: I desire to call the court's attention to the facts set forth in both of them. The first was taken on written interrogatories.

The COURT: You may read it.

53 And thereupon said deposition was read, and is in words and figures following:

(Commission, notice, and caption.)

Interrogatories to be Propounded to Harry H. Dudley, a Witness to be Called on Behalf of the Defendant in the Above-entitled Cause.

Int. 1. Please state your name, age, residence and occupation.

Int. 2. Are you the owner of any bonds issued by Lake county, Colorado?

Int. 3. Do you own any bonds of Lake county, Colorado, numbered 92 to 111 inclusive, bonds 83 to 86 inclusive, bonds 55 to 64 inclusive, 68 to 79 inclusive, and 80 to 82 inclusive, and bonds 65, 66, 67 and 87 to 91 inclusive and 83 to 86 inclusive, or any of them?

Int. 4. If in answer to the preceding interrogatory you state that you are the owner of any of said bonds or coupons cut therefrom please state when you purchased the same, from whom you purchased them and what consideration you paid therefor?

Int. 5. If you are not the owner of said bonds, or any coupons cut therefrom, please state what, if any, interest you have in the same.

Int. 6. Did you ever authorize any one in Colorado to invest your individual money in coupons or bonds of Lake county, and if you did give his name and state when you gave him that authority, the extent of the authority and how much money you have sent him to invest for you under the same.

Int. 7. When did you authorize the suit above-entitled suit of yourself *vs.* Lake county to be commenced?

Int. 8. Have you employed counsel in the above-entitled cause and are you paying them out of your individual money?

Int. 9. If you say you authorized suit to be commenced in your name please state under what circumstances you authorized it to be brought and whether or not the bond- or coupons upon which it was to be brought were your own individual property or were to be transferred to you simply for the purpose of bringing said suit.

Int. 10. If there is anything else you know concerning the controversy in the above-entitled cause between yourself and the County Commissioners of Lake County, Colorado, please state the same as fully and specifically as though you had been specially interrogated thereunto.

THOMAS, HARTZELL, BRYANT & LEE,

Attorneys for Defendant.

54 Int. 1. Please state your name, age, residence and occupation.

Ans. Harry H. Dudley; age, 35; Concord, N. H.; cashier Mechanics' national bank.

Int. 2. Are you the owner of any bonds issued by Lake county, Colorado?

Ans. Yes, I own certain Lake County bonds, which I hold under written bills of sale transferred to me from several different parties.

Int. 3. Do you own any bonds of Lake county, Colorado, numbered 92 to 111 inclusive, bonds 83 to 86 inclusive, bonds 55 to 64 inclusive, 68 to 79 inclusive, and 80 to 82 inclusive, and bonds 65, 66, 67 and 87 to 91 inclusive and 83 to 86 inclusive, or any of them?

Ans. I own, under the aforesaid bills of sale bonds mentioned in interrogatory 3 except it seems that numbers 83 to 86 inclusive have been mentioned twice.

Int. 4. If in answer to the preceding interrogatory you state that you are the owner of any of said bonds or coupons cut therefrom please state when you purchased the same, from whom you purchased them and what consideration you paid therefor.

Mr. PARKS: We object to interrogatory No. 4, because the question of consideration is immaterial.

The court overruled said objection, and to the ruling of the court the plaintiff by counsel then and there and at the time duly excepted.

Ans. In answer to interrogatory No. 4, I own by virtue of a written bill of sale from David Craig, Jr., J. H. Jagger, Henry D. Hawley and L. C. Hubbard bonds of Lake county, numbered 80, 81 and 82 for the sum of one thousand dollars each, and bonds numbered 83, 84, 85 and 86, for the sum of five hundred dollars each, together with all interest coupons commencing with No. 5 and all subsequent coupons of each bond. The consideration in said bill of sale being five thousand three hundred and eighty and fifty-six one-hundredths dollars. I also own by virtue of a written bill of sale from Joseph Standley, dated December 10th, 1884, bonds of Lake county of the denomination of one thousand dollars each, numbered from 68 to 79 both inclusive and six bonds of the denomination of five hundred dollars each numbered 67 and 87 to 91 both inclusive with all interest coupons attached. The consideration in said bill of sale being fifteen thousand eight hundred eighty-seven and fifty one-hundredths dollars. I also own by virtue of a written bill of sale from Susan F. Jones, executrix of the estate of Walter H. Jones, deceased, dated December 5, 1888, Lake County bonds of the denomination of one thousand dollars each numbered from No. 55 to 64 both inclusive and bonds of the denomination of five hundred dollars each and numbered from 65 to 66 both inclusive. The consideration named in said bill of sale is for value received. I also own bonds of Lake county, by virtue of a written bill of sale from the Nashua savings bank, dated March 20, 1885, numbered 92 to 111 both inclusive of the denomination of five hundred dollars each, together with all the interest coupons originally attached to said bonds and unpaid, the first being numbered No. 4 and the subsequent coupons being numbered consecutively to and including No. 21. The consideration named in said bill of sale being eleven thousand eight hundred sixty-nine and forty-five hundredths dollars. I also own bond of Lake county, by virtue of a written bill of sale from the Union Five-Cent Savings Bank of Exeter, N. H., bonds of Lake county numbered consecutively from 112 to 129 both inclusive of the denomination of five hundred dollars each together with all interest coupons originally attached to said bonds and unpaid, the first of said coupons being numbered No. 4 and the subsequent coupons being consecutively to and including No. 21. The consideration named in said bill of sale being ten thousand six hundred ninety-five dollars. I also hold a bill of sale and assignment from Susan F. Jones coupons cut from Lake County public building bonds Nos. 55 to 64 inclusive of the denomination of one thousand dollars and Nos. 65 and 66 of the denomination of five hundred dollars bonds, namely those falling due and payable in the years 1886, 1887, 1888, 1889, 1890 and 1891; and also coupons amounting to six hundred dollars cut from bonds Nos. 55, 56, 57, 58, 59 and 60, falling due in the year 1884.

Int. 5. If you are not the owner of said bonds, or any coupons cut therefrom, please state what, if any, interest you have in the same?

Ans. I have stated my interest in the bonds in my answer to interrogatory 4.

Int. 6. Did you ever authorize any one in Colorado to invest your individual money in coupons or bonds of Lake county, and if you did give his name and state when you gave him that authority, the extent of the authority and how much money you have sent him to invest for you under the same?

Ans. I did not give any one in Colorado authority to invest my individual means in Lake County bonds.

Int. 7. When did you authorize the suit above entitled suit of yourself *vs.* Lake County to be commenced?

Ans. I cannot name any date. E. H. Rollins & Sons have looked after these matters for me.

Int. 8. Have you employed counsel in the above-entitled cause and are you paying them out of your individual money?

56 Ans. I have not personally employed counsel in the above-entitled cause because, as I have already stated, E. H. Rollins & Sons have looked after these matters for me and, as I understand it, they have employed counsel in these suits.

Int. 9. If you say you authorized suit to be commenced in your name please state under what circumstances you authorized it to be brought and whether or not the bond or coupons upon which it was to be brought were your own individual property or were to be transferred to you simply for the purpose of bringing said suit?

Ans. I understand said bonds and coupons were transferred to me, as aforesaid, for the purpose of bringing a suit against the county to make them pay the honest debts of the (*company*).

Int. 10. If there is anything else you know concerning the controversy in the above-entitled cause between yourself and the County Commissioners of Lake County, Colorado, please state the same as fully and specifically as though you had been specially interrogated thereunto?

Ans. There is nothing further to state.

HARRY H. DUDLEY.

(Certificate of officer taking deposition. Subpcena.)

Indorsed: 2758. U. S. circuit court. H. H. Dudley *vs.* Lake County. Deposition of H. H. Dudley for def't. Opened, published and filed Jan. 21, 1895. Robert Bailey, clerk U. S. circuit court.

Mr. BRYANT: Now, that one was taken on written interrogatories. Now here is one on oral interrogatories.

Said deposition now read is in words and (*and*) figures following:

"Deposition Taken Before Judge Silsby, Concord, N. H., March 2, 1895.

C. S. THOMAS, Esq., counsel for the defendant:

I, Harry H. Dudley, of Concord, in the county of Merrimack and State of New Hampshire, on oath depose and say in answer to the following interrogatories:

Int. 1. Mr. Dudley, you are the plaintiff in this case, I presume?

Ans. Yes, sir.

Int. 2. Did you give a deposition in this case for the defendant in answer to certain interrogatories before Judge Silsby, the judge of probate for Merrimack county, New Hampshire, on or about the 14th day of January, 1895?

Ans. I did.

Int. 3. In answer to interrogatory 4 of that deposition you say among other things that you own by virtue of the written bill of sale from David Craig, J. H. Jaeger, Henry D. Hawley and L. C. Hubbard bonds of Lake county, Nos. 80/81, and 82, for the sum of \$1,000 each, and bonds Nos. 83, 84, 85 and 86, for the sum of \$500 each, together with all interest coupons commencing with No. 5, and all subsequent coupons of each bond. What is the date of that bill of sale?

Ans. I do not remember the date now. I think it was February 11, 1885.

Int. 4. Where is that bill of sale?

Ans. I think it is in Denver.

Int. 5. In whose custody is it at Denver?

Ans. Really I could not tell

Int. 6. In whose custody was it when you last knew anything about it?

Ans. I think it was sent to E. H. Rollins & Sons, or Mr. E. W. Rollins. I do not remember which.

Int. 7. By whom was it sent?

Ans. Sent by me

Int. 8. Is that bill of sale made to you?

Ans. Yes, sir.

Int. 9. When was it that you sent it to Denver?

Ans. I should think it was during the month of January.

Int. 10. In what year?

Ans. 1895.

Int. 11. Why was it sent in January, 1895?

Objected to as immaterial and irrelevant.

Ans. What was the question, why it was sent then? I had no further use for it here particularly.

Int. 12. Was it sent before or after your previous deposition?

Ans. I am not positive about that matter, but I should say it was sent afterward. I am quite sure it was.

Int. 13. You also say in the answer to which I have referred, that the consideration in the said bill of sale was \$5,380.56. Did you pay that consideration for the bonds mentioned in the bill of sale?

Ans. No, I did not.

Int. 14. Did you pay any part of it?

Ans. No, sir.

Int. 15. Why was that bill of sale made to you, Mr. Dudley?

Ans. I think I have answered that in some interrogatory here, my answer to Int. 9 in the deposition I gave before in this case.

Int. 16. Are not the bonds mentioned in the said bill of sale, together with the coupons, still owned in fact by the grantors named in said bill of sale?

Ans. Not as I understand the bill of sale. I understand I am absolute owner.

Int. 17. Was not that bill of sale made to you for the purpose of enabling you to prosecute this claim upon them?

Ans. My answer to Int. 9 in my former deposition answers that also.

Int. 18. I repeat the question and ask for a categorical answer.

Ans. I cannot more fully answer the question than I have in answer to Int. 9, former deposition.

Int. 19. Do you decline to answer it, yes or no?

Ans. I think this answer is sufficient.

Int. 20. If you are successful in the suit brought upon the coupons heretofore attached to the bonds mentioned in said bill of sale, do you not intend to pay the amount of those coupons so recovered to the grantors in said bill of sale, less any legitimate expenses attendant upon the prosecution of this case?

Ans. Yes. My understanding in the matter would be something might be paid them.

Int. 21. Is there something to be paid them different from the amount involved in the suit represented by the coupons cut from said bonds?

Ans. I should think there was.

Int. 22. In what respect is the difference?

Ans. They would not be paid the full amount.

Int. 23. What deduction would you make?

Ans. I do not know just what deduction would be made.

Int. 24. When you took this bill of sale, did you execute some sort of a written statement back to the grantors of said bill of sale?

Ans. No, sir.

Int. 25. Did you make a verbal agreement at the time with them or any of them?

Ans. No, sir.

Int. 26. Were you present when the bill of sale was drawn?

Ans. No, sir.

Int. 27. Where was it drawn?

Ans. My impression is that it was drawn at Hartford, Conn., this particular one that you refer to.

Int. 28. Yes. Who represented you at the drawing of the bill of sale?

Ans. I have no knowledge of being represented there.

Int. 29. When did you first know that such bill of sale had actual existence?

59 Ans. When I received it.

Int. 30. When was that?

Ans. I cannot tell the date. It was in the year 1894.

Int. 31. Then you knew nothing of it until some nine years after it was made?

Ans. That was the first I knew of it, the year 1894.

Int. 32. In the answer already referred to, you say that all interest

coupons commencing with No. 5, and all subsequent coupons of each bond were transferred by the bill of sale.

(Mr. SARGENT: You say "in the answer already referred to." There has been another answer, No. 9.)

— In answer to Int. 4 already referred to, you say that the bill of sale conveyed—

(Mr. SARGENT: You say "in answer to No. 4 already referred to." There is a No. 4 in this one too. Would not you say "in your former deposition?")

— Yes; in your former deposition, you say that all interest coupons commencing with No. 5, and all subsequent coupons of each bond were transferred back. Why was there not included in this suit the coupons numbered 5 to said bonds, as well as those succeeding it up to and including those for 1891?

(That is objected to on the ground that it is immaterial and irrelevant.)

Ans. Do I understand, Mr. Thomas, you mean the coupons before No. 5?

Int. 33. No; coupon No. 5.

Ans. My answer was, commencing with five and all subsequent coupons. I should understand that did include coupon No. 5.

Int. 34. Is your understanding of the present suit that it includes coupon No. 5 to bonds 80, 81, 82, 83, 84, 85, 86?

Ans. I am not sure as to that point, but from that written bill of sale I should interpret it included No. 5.

Int. 35. If, as a matter of fact, coupon No. 5 of the bonds mentioned in my last question are not included in this suit, would you still say that coupon No. 5 was included in said bill of sale?

Ans. I do not quite understand that question. What I claim is that as I understand it, coupon No. 5 is included in the bill of sale?

Int. 36. Whether it is in the suit or not, you do not know?

Ans. I suppose it is in the suit.

60 Int. 37. In your answer to Int. 4 of your former deposition, you also say that you own by virtue of the written bill of sale from Joseph Stanley, dated December 10, 1884, Lake County bonds from 68 to 79 inclusive, No. 67, and from 87 to 91 inclusive with all interest coupons attached. Where is that bill of sale?

Ans. That is in Denver, I think.

Int. 38. Did you send that to Denver with the other?

Ans. I am quite sure that I did.

Int. 39. When did you first know of the existence of the bill of sale?

Ans. I think it was in the year 1894.

Int. 40. Some ten years after it was made?

Ans. Do you want me to answer that?

(—.) Yes.

Ans. I received it as I have stated heretofore, that was the first I knew of it.

Int. 41. Are you personally acquainted with Joseph Stanley ?

Ans. I am not ; no, sir.

Int. 42. Did you ever meet him ?

Ans. Don't remember that I ever met him.

Int. 43. Did you at any time ever pay him \$15,887.50 for the bonds mentioned in his bill of sale to you ?

Ans. No, sir.

Int. 44. Did you ever pay him any part of it ?

Ans. No, sir.

Int. 45. Is it not a fact that Mr. Stanley still owns these bonds ?

Ans. I have answered in a former deposition that I hold a bill of sale of certain bonds of Joseph Stanley.

Int. 46. Do you refuse to answer the last question I asked you, yes or no ?

Ans. I prefer to answer it as I have stated above.

Int. 47. If you should recover in this suit, are not the amounts represented by the coupons cut from the bonds mentioned in the Stanley bill of sale to be paid to Joseph Stanley less the expenses of this suit ?

Ans. I could not answer that definitely.

Int. 48. Why not ?

Ans. Because I haven't enough knowledge of the matter to answer it definitely.

Int. 49. You have no knowledge of it at all personally, have you ?

Ans. My understanding of the matter would be, Joseph Stanley would have a certain amount of money if the suit was won.

61 Int. 50. Was not the bill of sale drawn in Denver—the Stanley bill of sale ?

Ans. I have no actual knowledge where it was drawn.

Int. 51. Do you know who had the bill of sale before it was sent on to you in 1894 ?

Ans. I do not think I have any actual knowledge.

Int. 52. Did you have any sort of knowledge ?

Ans. Yes. I imagined it came from Rollins & Son.

Int. 53. By letter ?

Ans. It came through the mail.

Int. 54. Have you the letter now ?

Ans. I do not think that I have, no, sir.

Int. 55. What did you do with it ?

(Objected to on the ground that the witness has not received any letter in connection with it, simply that the bill of sale came through the mail.)

Ans. I could not swear that it was.

Int. 56. It came in December of 1894, did it not ?

Ans. I should say it did.

Int. 57. Were not all these bills of sale sent to you, Mr. Dudley, after you were notified that the commission had been issued to take your deposition on written interrogatories ?

Ans. No, sir.

Int. 58. How long before that time was it that you received them?

Ans. I should say that I had received some of these bills of sale early in the fall of 1894.

Int. 59. Will you state why they were sent to you early in the fall of 1894?

(Objected to as immaterial and irrelevant.)

Ans. I have no knowledge why they were sent, only that they properly belonged in my possession at that time.

Int. 60. But at the time you received them you had no knowledge that such bills of sale were in existence?

(Objected to as immaterial and irrelevant.)

Ans. I had not seen them before.

Int. 61. Were they not sent to you about or immediately after the time that your deposition was taken in the case entitled "H. H. Dudley vs. The Board of County Commissioners (in) the County of Gunnison, pending in the United States district court for the district of Colorado"?

(Objected to on the same grounds.)

62 Ans. I do not just remember that date when the deposition was given, but I should have said that part of these bills of sale I had before that time, perhaps a month or more, I do not know but several months. Along in November, was it?

Int. 62. I thought I had the date, but I have not. In your answer to Int. 4 in your former deposition you also say that you own by virtue of the bill of sale from Susan F. Jones, executrix, dated December 5th, 1888, Lake County bonds Nos. 55 to 64 inclusive, and 65 and 66 inclusive. When did you first know of the existence of the bill of sale?

Ans. I do not remember when that was received.

Int. 63. Was it before or after the others?

Ans. I could not say definitely.

Int. 64. Do you know Susan F. Jones?

Ans. No, sir.

Int. 65. Were you present when that bill of sale was drawn?

Ans. No, sir.

Int. 66. Where is it now?

Ans. I think that is in Denver.

Int. 67. Sent with the others?

Ans. I am quite sure it was, yes.

Int. 68. What did you pay for that bill of sale, Mr. Dudley?

Ans. For consideration not named in the bill of sale.

Int. 69. That does not answer my question. What did you pay for it?

Ans. I do not remember as I paid anything.

Int. 70. Do you remember that you did not pay anything?

Ans. It is my impression that I did not.

Int. 71. Were you present when it was drawn?

Ans. No, sir.

Int. 72. In the event you recover a judgment in this case, are not the amounts of the coupons belonging to the bonds mentioned in the bill of sale from Mrs. Jones, to be paid Mrs. Jones less her proportion of (*waging*) the case?

Ans. I could not state definitely about that.

Int. 73. Why?

Ans. For the reason that I have answered similar questions above.

Int. 74. Going back to the bonds of Mr. Stanley, I will ask you one or two other questions. Is Mr. Stanley a citizen of Colorado?

Ans. I think he is.

Int. 75. Now why did you not include in this case the coupons belonging to the Stanley bonds for 84, 85 and 86, and the coupons to bonds 68 to 72, included in the Stanley bill of sale for 1888, and the coupons on 67, 87-91 for 1884-'5?

Ans. If they were not included I do not know why they were not.

63 Int. 76. Is Mrs. Jones a citizen of the State of Colorado?

Ans. I think she is.

Int. 77. Were not those bonds of Stanley and Jones assigned to you in order that you might as a citizen of another State bring suit upon them and upon the coupons belonging to them in the Federal court in Colorado?

Ans. I should answer that by referring to my answer in former deposition to Int. 9.

Int. 78. Do you decline to answer the question, yes or no?

Ans. I do.

Int. 79. Is it because to answer yes or no would be untrue?

(The question now asked has been sufficiently answered in the answer to the previous question, and the witness ought not to be enquired of further.)

Int. 80. The answer in the former deposition is evasive, or I would not be here. At least, I think it is.

(Counsel for the defendant desires to object, because under the rule governing the taking of depositions like this, objections are made to be preserved in the record, and the court in which the case in which the deposition is taken is pending is alone to determine upon the pertinency or immateriality of the question and the right of the witness to refuse to answer.)

Int. 81. In your answer to Int. 4 of your former deposition, you also say that you own bonds of Lake county by the written bill of sale from the Nashua savings bank, numbered 92-111 both inclusive, together with all coupons originally attached and unpaid. You also say that the consideration for the said bill of sale is \$11,689.45. Did you pay any part of that, Mr. Dudley?

Ans. No, sir.

Int. 82. Were you present when the bill of sale was drawn?

Ans. No, sir.

Int. 83. When did you first know that there was such a bill of sale?

Ans. As soon as I received it, in the year 1894.

Int. 84. In the event of a recovery in this case, are not the amounts of the coupons belonging to the said bonds to be paid over to the Nashua savings bank less their proportion of the expense of this litigation?

(Objected to as immaterial and irrelevant.)

Ans. I do not know how much will be paid them.

Int. 85. Do you know anything about it?

Ans. Indirectly, yes.

Int. 86. Do you mean by that, you have some hearsay evidence upon it?

64 Ans. Yes. I have an impression from hearsay that the bank would have some equivalent for these bonds if suit was won.

Int. 87. You say here that you own bonds of Lake county by virtue of a bill of sale from the Union Five-Cent Savings Bank of Exeter, numbered 112-129, inclusive, together with all coupons, the first being No. 4, and the subsequent ones being consecutive up to and including No. 21. What is the date of that bill of sale?

Ans. I think that was dated March 25, 1885.

Int. 88. Were you present when it was made?

Ans. No, sir.

Int. 89. When did you first know of its existence?

Ans. In the year 1894.

Int. 90. At the time that you were informed of the existence of the others?

Ans. Nearly at the same time I should say.

Int. 91. Did you pay the Bank of Exeter \$10,695, or any other sum for the bonds mentioned in that bill of sale?

Ans. No, sir.

Int. 92. You also say in the same answer to the same interrogatory in your former deposition that you hold a bill of sale and assignment from Susan F. Jones for coupons Nos. 55 to 64, and Nos. 65 to 66 for the years 1886, '7, '8, 1891, also coupons amounting to \$600 from bonds 55-6-7-8-9-60 falling due in the year 1894. What is the date of that bill of sale and assignment?

Ans. I could not tell.

Int. 93. When did you first know of its existence?

Ans. I should say in 1894.

Int. 94. Did you pay anything for it?

Ans. No, sir.

Int. 95. Now why did you not include in this suit coupons to bonds 55 to 65 inclusive for 1891, coupons to bonds 65-66 for 1891, and coupons to bonds 112-129 inclusive for 1884-5-6-7-8?

Ans. If they were not included, I do not know why they were not.

Int. 96. Where are the coupons to which the last questions refer?

(Objected to as immaterial and irrelevant.)

Ans. I don't think I could tell.

Int. 97. Did you ever have in your possession any of the coupons or any of the bonds to which this examination has thus far been directed?

(Objected to as immaterial and irrelevant.)

The Court: He may answer the question.

65 To which ruling of the court the plaintiff by counsel then and there duly excepted.

Ans. Strictly speaking, I don't think I ever had them in my own possession. I have seen some of the bonds and handled them, had them in a safe.

Int. 98. Where?

Ans. In Boston.

Int. 99. When?

Ans. Well, I should say in the year 1893.

Int. 100. But that was before you knew they had been assigned to you by bill of sale, was it not?

Ans. I was really handling them as agent for other parties.

Int. 101. Who were the other parties you were handling them as agent for?

Ans. I don't know as I was exactly an agent. I was an officer of another company. They came into our hands.

Int. 102. What was that company?

Ans. E. H. Rollins & Sons.

Int. 103. Were you a stockholder of that company?

Ans. Yes.

Int. 104. Are you now?

Ans. Yes, sir.

Int. 105. Is not that the only interest which you have in these bonds or any of them, your interest as a stockholder in the firm of E. H. Rollins & Sons?

Ans. Yes, probably it is.

Int. 106. When did you first know that this suit was pending?

Ans. I would like to correct my answer to that last.

(—) Certainly.

Ans. My only *request*, excepting as the interest I have in the bills of sale, as they show.

Int. 107. When did you first know of the pendency of this suit in your name?

Ans. In the year 1894.

Int. 108. Have you ever employed counsel to bring this suit, paid any of the costs of the suit, or made any disbursements with reference to it whatever?

(Objected to as immaterial and irrelevant.)

Ans. I refer to my answer to Int. 7 in the former deposition.

Int. 109. Do you decline to answer the last interrogatory categorically?

Ans. No, I do not decline to.

Int. 110. Then please do so, and for that purpose I will repeat the question. Have you ever paid out any money for the employment of counsel, for the costs in this case, or for any other disbursements or made any other disbursements of money concerning it?

Ans. E. H. Rollins & Sons of Denver have looked after these matters for me.

Int. 111. Is the answer which you have just made to the last question, one which you read from previous interrogatory in this case?

Ans. Yes.

Int. 112. Do you do it by instruction of counsel?

Ans. No.

Int. 113. Why do you refuse then to answer the question, yes or no?

(Objected to on the ground that he has not refused, and has expressly said he does not refuse.)

Int. 113. I understand that, but he does not just the same. The witness says he is willing to answer categorically. I ask that he be required to answer that question categorically. Have you paid any money for counsel or for costs, or made any disbursements in the case in which this (*disposition*) is being taken?

Ans. No. E. H. Rollins & Sons of Denver, have looked after these matters for me.

Int. 114. When you gave your former deposition in this case to written interrogatories, Mr. Dudley, did you have counsel present?

Ans. Yes, sir.

Int. 115. Were the answers which you made to the questions in that interrogatory prepared?

Ans. I think they were.

Int. 116. Who prepared them?

Ans. I prepared them with help of counsel.

Int. 117. About how much time did you and counsel give to their preparation?

(Objected to as immaterial and irrelevant.)

Ans. It was a short time comparatively. I do not remember. An hour or two perhaps.

Int. 118. Were they prepared in writing?

Ans. Yes, sir.

Int. 119. And then did you read the answers thus prepared when you came before the commissioner to answer the interrogatories?

Ans. As I remember I did.

Int. 120. Do you know a man named G. W. Wright who was formerly in the employ of E. H. Rollins & Sons?

(Objected to as immaterial and irrelevant.)

67 Ans. You mean George W. Wright?

(—.) Yes.

Ans. Yes, sir; I know him.

Int. 121. Were you ever in Denver?

Ans. Yes.

Int. 122. When?

(Objected to as immaterial and irrelevant.)

Ans. I don't remember the year, but I should say it was in 1891.

Int. 123. Were you ever there before or after?

(Objected to on same ground.)

Ans. No, sir.

Int. 124. Did you on that occasion tell Mr. G. W. Wright to buy for you the coupons which form the subject of this suit?

(Objected to on same ground.)

Ans. No, sir; I didn't.

Int. 125. Did you ever instruct him while there or in writing, to buy these coupons for you, or any of them?

(Objected to as before.)

Ans. I don't remember that I did.

Int. 126. Do you know anything of the firm of George B. Bissell & Co. of Hartford?

(Objected to on same ground.)

Ans. I know they are bankers in Hartford. Further I don't know anything about them.

Int. 127. Do not the bonds numbered 81-2-3-4-5-6 and the coupons cut therefrom, belong to George B. Bissell & Co., of Hartford?

Ans. I don't know.

Cross-examination.

By H. G. SARGENT, counsel for plaintiff:

Int. 128. You have been asked if you knew why certain coupons which have been specified by counsel in several different questions, were not included in the present suit. Have you any knowledge that any of said coupons enquired about are or are not included in said suit?

Ans. No. I have no knowledge of any coupons being included, except what I have stated in my former deposition.

Int. 129. But the questions which have been put to you by counsel upon the other side have assumed that certain coupons
68 he has enquired about were not included in the present suit. Do you mean to be understood that you know that they are or are not actually described in the papers in the present suit?

Ans. I do not know whether they are included or not.

Int. 130. In your answer to Int. 4 in your former deposition you have referred to certain bonds which you own by virtue of certain bills of sale therein described. Have you given to any of said parties who have made said bills of sale to you any obligation either in

writing or verbally to return them anything if coupons or bonds are collected?

Ans. No, sir.

Int. 131. State whether or not David Craig, J. H. Jagger, Henry D. Holley, L. C. Hubbard, the Nashua savings bank, Union Five Cent Savings Bank of Exeter, N. H., referred to in your answer to Int. 4, or any of them, are citizens or residents of the State of Colorado.

Ans. No, I don't understand that they are.

HARRY H. DUDLEY.

(Subpœna. Certificate of officer taking deposition.)

Indorsed: 2758. U. S. circuit court. Harry H. Dudley vs. Lake County. Deposition of H. H. Dudley for def't. Opened, published and filed Jan. 4, 1896. Robert Bailey, clerk.

2 P. M.

Mr. BRYANT: For the purpose of saving time, we propose now to introduce in evidence the amount of indebtedness of Lake county at the time these bonds were issued, upon the 31st day of July, 1880; and also that of the preceding fall when the bonds were voted for by the people of the county. I will introduce the books of the county clerk and recorder for the purpose of proving those facts. Now this evidence was objected to at the last trial, and some of it, after argument before your honor, was sustained, and some of it was excluded. I suppose they will make the same objections now. If they do we want to be heard. I do not suppose they will object to the method of proving it, but that is what we offer to prove now.

Mr. PARKS: Our objection before went to the character of the proof, and it was shown before your honor on the other trial that it appeared that the defendant desired to prove this indebtedness by a record which we objected to, and which we contended did not come up to the requirements of the statute, and on that theory your honor excluded it; and of course we make the same objection now; and I suggested to counsel that he might follow the proceedings of the other trial; but I do not know as that can be done.

Mr. BRYANT: One difference from that trial is that we have Mr. Newell here with the original books of the county.

69 Mr. JOHNSON: Is this: Your honor may not remember the proceedings in the former trial, but there is a provision of our statutes, passed upon in the Sutliff case, that the boards of county commissioners shall make over their signatures a semi-annual statement of the outstanding indebtedness of the county, and that that shall be recorded in a book kept for that purpose only, and shall be published in some newspaper. Now if there was any such record as that kept, we have no objection to its introduction, but the court held on the former trial that the general account books and records of the county could not be introduced for the purpose of bringing the case within the rule in the Sutliff case, requiring a purchaser of bonds to take notice of the outstanding indebtedness which was not shown in such semi-annual statement.

Mr. BRYANT: There are two differences between this trial and the

other one. At that trial we did not have the county clerk and recorder here for the purpose of showing that the book which we offer in evidence and which I hold in my hand, was the very one which was kept by the county. The fact is that now we have what is called the county clerk's account book, and while the title is not identical with that set forth in the statute, it contains all the subject-matter which the statute requires to go into it, and makes up a semi-annual statement. In addition to that, at this hearing we have the original papers, the Herald-Chronicle, showing the publication of this statement and that public notice was given of it. We think there is a difference between that hearing and this, and in addition to that there is another matter which was not called to your honor's attention at that hearing, but which we would like to call to your attention now, and that is that these bonds do not recite upon their face that the constitutional limitation has not been reached; and then aside from all that there is the additional evidence which we have introduced in this case, as to Mr. Dudley's ownership of these bonds. The testimony which we have introduced shows that he is not a *bona fide* purchaser for value, and therefore he cannot come within the rule of an innocent purchaser. I think we are entitled to show any fact which will tend to overthrow the validity of these bonds. In other words, if he was under your honor's ruling before, perhaps if he was a *bona fide* and innocent purchaser of these bonds for value, and the county officers having failed to keep this book as the statute required, he would not be required to take notice of it, but if he is not a *bona fide* holder, and had notice that the issue was not within the constitutional limit, no matter how it was shown that that would be an equity between him and the person who received the bonds and we would be entitled to produce proof of it, and under those circumstances we are entitled to introduce these proofs in evidence.

The COURT: I think, under the rule as announced in the case of *National Life Ins. Co. vs. Board of Education*, decided by our circuit court of appeals since the former trial, that the ruling of the court excluding this testimony at that time was wrong; I think the testimony will have to be admitted.

Mr. PARKS: Counsel only referred to the case in the 62nd Federal Reporter—

The COURT: Still, as to the formalities required by the statute, viz: the regularity of the election, you cannot go into that; that is recited in the bond; but you may go into the question of exceeding the constitutional limit, because there is nothing in the bond which would cause a purchaser to rely upon it in any way that he is bound under this decision to make an examination.

Mr. PARKS: We probably understand that to be so, but the character of the proof is what we discussed before, and that is the question here.

The COURT: Mr. Bryant offers now to improve the character of the proof materially. This case takes very broad grounds. I will let the court of appeals decide that question and will admit the proof.

To which ruling of the court the plaintiff by counsel then and there duly excepted.

J. W. NEWELL, a witness produced, sworn and examined on behalf of the defendant, testified as follows:

Direct examination.

By W. H. BRYANT, Esq.:

Q. Where do you reside, Mr. Newell?

A. Lake county, Colorado; in Leadville.

Q. And what is your business?

A. I am at present county clerk of Lake county.

Q. How long have you been county clerk of the county?

A. Nearly two years.

Q. Your term expires in a few days?

A. Yes, sir, on the 13th.

Q. Are you familiar with the records of Lake county?

A. Yes, sir.

Q. I hand you this book and ask you what it is?

A. It is the county clerk's account book.

Q. When does that commence, Mr. Newell?

71 A. It commences—I do not know the exact date; about 1880, I think.

Q. Well, can you see from the book itself?

A. Along the first of 1880.

Plaintiff objected because the book will speak for itself.

Q. Does that show the amount of the indebtedness of the county on the 1st day of January, 1880?

A. Yes, sir.

Plaintiff objected for the same reason.

The Court: That is clearly proper as a preliminary question.

To which ruling of the court plaintiff by counsel then and there duly excepted.

Q. Does it give a statement of the condition of the county finances at that time?

A. Yes, sir; it should.

Plaintiff objected to said answer as a conclusion, and because immaterial and incompetent.

Objection overruled. To which ruling of the court the plaintiff by counsel then and there duly excepted.

Q. Has the county among its records a book which shows the semi-annual financial statement of the county, made twice a year?

A. Yes, sir.

Q. Now when does that book commence its record, a record of the semi-annual statements?

Plaintiff objected because the book will show for itself, whether it is a semi-annual statement book.

Mr. BRYANT: The object is to show that what is known as the record of semi-annual statement book never commenced until some years after this, and that this is the only book which the county kept at that time.

Objection overruled. To which ruling of the court the plaintiff by counsel then and there duly excepted.

Q. When did that book commence to keep that record of semi-annual statements?

Plaintiff objected because the book will show for itself when it commenced, and because it is immaterial and incompetent. Objection overruled. To which ruling of the court the plaintiff by counsel then and there duly excepted.

Q. When do the records shows that the county commenced to keep what is called the regular semi-annual statement book?

72 Plaintiff objected for the reasons last above given. Objection overruled; to which ruling of the court the plaintiff by counsel then and there duly excepted.

A. I have not examined these old books which were kept in the office; only glanced over them; and I do not know when that book was started.

Q. Is this the first book showing the financial condition of the county?

A. Yes, sir.

Q. This is the beginning?

A. Yes, sir.

Q. Now, how far does that run from the time it begins?

A. It commences in January, 1880, and ends December 31, 1889.

Q. Now is that the only book kept or that was kept by the county, which shows these facts?

A. Yes, sir.

Mr. BRYANT: Here is a transcript of it which we would like to introduce in evidence instead of the original book.

The COURT: Offer your book, and then you may leave the transcript on file.

Mr. BRYANT: We will offer the book, then, showing the condition of the county's finances.

Plaintiff objected for reasons last above given; objection overruled; to which ruling of the court the plaintiff by counsel then and there duly excepted.

Q. Now, Mr. Newell, will you indicate the pages which show the county's financial standing from the beginning of the book, until the 31st of December, 1880, I believe, when these bonds were dated?

Plaintiff objected for reasons last above given; objection overruled; to which ruling of the court plaintiff by counsel then and there duly excepted.

A. It is found on pages 1, 2 and 3.

Q. Pages 2 and 3 show the semi-annual statement to July 1, 1880; is that right?

A. Yes, sir.

Q. Page 1 shows the statement to January 1, 1880?

Plaintiff objected for reasons last above given; objection overruled; to which ruling of the court the plaintiff by counsel then and there duly excepted.

73 A. Yes, sir.

Q. Are these papers copies of this first and second pages, and certified to?

Plaintiff objected for the reasons last above given; objection overruled; to which ruling of the court the plaintiff by counsel then and there duly excepted.

A. Yes, sir.

Q. Now turn to pages 21 and 22. What does that show?

Plaintiff objected for reasons last above given; objection overruled; to which ruling of the court the plaintiff by counsel then and there duly excepted.

A. It shows the county indebtedness in 1879.

Q. It shows the county indebtedness at that time?

Mr. PARKS: I submit to the court that the questions are unfair and improper. He asks him straight out if they show the county indebtedness. That is a conclusion of law. In fact, the witness knows no more about what the book shows than if it had never existed. I object to the form of the question. It is impossible for him to know it unless he made it, unless he was the county officer who contracted the debt. It is leading, incompetent, and calls for conclusions of law and fact.

Objection overruled. To which ruling of the court plaintiff by counsel then and there duly excepted.

Q. Now turn to page 22, Mr. Newell, and tell us what (what) shows.

Plaintiff objected for reasons last above given; objection overruled; to which ruling of the court plaintiff by counsel then and there duly excepted.

A. The indebtedness of 1881 and 1882.

Q. What period does that end with?

A. It ends with December, 1882.

Q. Now can you give us from that book the amount of outstanding indebtedness of Lake county on January 1, 1880?

Plaintiff objected because immaterial and incompetent, and calling for conclusions of law and fact.

The COURT: Ask what that book shows.

Q. Does the book show the outstanding indebtedness of Lake county on the 1st of January, 1880?

74 Plaintiff objected for the same reasons last above given. Objection overruled. To which ruling of the court the plaintiff by counsel then and there duly excepted.

A. Yes, sir.

Q. Now then tell us the amount of the indebtedness, according to that book.

Plaintiff objected for the same reasons last above given. Objection overruled. To which ruling of the court the plaintiff by counsel then and there duly excepted.

A. It is \$84,296.28.

Q. Does that book show the amount of the outstanding indebtedness of Lake county on the 1st day of July, 1880?

Plaintiff objected for the same reasons last above given. Objection overruled. To which ruling of the court the plaintiff by counsel then and there duly excepted.

A. Yes, sir, it does.

Q. What was that amount?

Plaintiff objected for the reasons last above given. Objection overruled. To which ruling of the court plaintiff by counsel then and there duly excepted.

A. It is given here as \$198,394.57.

Mr. BRYANT: Now, if your honor please, I want also to show the amount on the 1st of January, 1881, because these bonds bear date after the semi-annual statement of July 1st, 1880. They are issued July 21st, 1880, but they were as a matter of fact issued some time prior to that, but that is the date of it and that is the date set up in the complaint. Of course a purchaser would be bound to ascertain the amount of this last semi-annual statement on the 1st of July. We also have the county bond register, which shows the amount of warrants from day to day, and which will show that up to the 21st of July when these bonds were issued, the indebtedness was continually increasing; and for the purpose of getting the record straight, and saving our exceptions, I would also like to show the amount of outstanding indebtedness on the 1st day of January, 1881, that being for the next period and the period within which these bonds were issued, and it seems to me that the period immediately preceding would cover it, but for the purpose of getting both in the record, I want to introduce them.

Plaintiff objected because immaterial and incompetent, and because it proves nothing, and is not within the issues. It calls for the conclusions of the witness and is not the best evidence.

75 The COURT: I think it may tend to show by these two statements that the county indebtedness was constantly increasing. I think that he may show that. I think they are bound by the statement of July 1st, but still I think he may offer it.

To which ruling of the court the plaintiff by counsel then and there duly excepted.

Q. Does that show the amount of outstanding indebtedness on the 1st of January, 1881?

A. Yes, sir.

Q. What is the amount?

A. It is \$293,053.20.

Q. Now, according to that book, is that outstanding indebtedness which you mentioned, evidenced? By warrants or bonds?

Plaintiff objected because immaterial and incompetent; not within the issues; not the best evidence; and calls for conclusions of law and fact. Objection overruled. To which ruling of the court the plaintiff by counsel then and there duly excepted.

A. It is evidenced by bonds.

Q. How long have you lived in Leadville, Mr. Newell?

A. About fourteen years and a half.

Q. Were you there in 1880?

A. No, I went there in 1881.

Q. Do you know the files of the Leadville Weekly Democrat?

A. No, sir, I don't. I know there were files, that is all; I have seen them in the office. I do not know anything about them.

Mr. BRYANT: Now, if your honor please, we have here copies of the warrant register of Lake county, showing the indebtedness of Lake county from day to day during all this period of time, and we would offer those in evidence.

Q. Did you bring the warrant register with you, Mr. Newell?

A. No, sir.

Q. What is that other book?

A. That is the commissioners' record, the other book.

Cross-examination.

By D. E. PARKS, Esq.:

Q. How long have you been county clerk of Lake county?

A. I went into office January 9, 1894.

76 Q. What do you know about the indebtedness of Lake county except during your term of office?

A. I do not know anything about it.

Q. Your testimony given here, of the face of that book, is only what you suppose the book states?

A. It is only what the book gives.

Q. It is your supposition that the book states the indebtedness, is it not?

A. Well, of course.

Q. You don't know whether that is the indebtedness?

A. No, sir.

Q. When did you first go to Leadville?

A. In 1881.

Q. Then you do not know anything about this transaction of your own personal knowledge?

A. I have no personal knowledge of it.

Q. The thing happened before you came there, didn't it?

A. It did. I did not go there until 1881.

Q. All you know of this transaction is from your two years' experience in the county clerk's office, and then only when your especial attention has been called to it?

A. Yes, sir.

Q. You know nothing yourself of this transaction, this indebtedness, except what you glean from the face of the books?

A. That is all I could know.

Q. Now, when you swore that the indebtedness of Lake county is a certain amount, you simply meant to be understood that those figures there show that?

A. Yes, sir.

The COURT: Be fair to the witness. He has testified that the books show that.

WITNESS: All in the world that I know is what the book shows.

Q. You assume that the book shows something. You do not know that it shows it?

A. It shows it there.

Q. It purports to show it, you mean. It purports to show certain figures on a certain subject, does it not? That is what you mean?

A. As I said, all that I know is what the book shows. I did not know anything about it at that time, except as it was filed in the office of the county clerk.

Q. You never had occasion to look into this indebtedness to see what it was?

A. No, sir, not in that old book.

77 Q. I mean that you have not gone back in this record and looked up this indebtedness and taken up these warrants which are in your office.

A. I had no occasion to do that.

Q. Do you know whether or not these warrants are in your office?

Defendant objects to the line of cross-examination. All that witness has testified to is in this book.

Mr. PARKS: You have got an expert witness; I want to see what he knows about this book.

Q. Do you know whether or not the warrants, or the indebtedness shown on the face of this record is an indebtedness or not, of your own knowledge?

Mr. BRYANT: I object. He cannot know it of his own knowledge.

The COURT: He may answer it if he knows.

A. Well——

Q. Yes or no.

The COURT: No, Mr. Parks; you will not take the double ground

of witness and counsel. You ask the questions and let him answer, without any suggestions.

WITNESS: As I said, the only thing I know is what these books show, and the only thing I know of the books is that they were in my office when I took charge of the office, and I know they are there today.

Q. You do not know whether the books are correct or not?

A. I do not know about that.

Q. You do not wish to be understood as testifying that the books are correct?

A. I do not testify to somebody else's work at all, and I did not mean to do that at the start.

Q. This is not the record of the semi-annual statements of the county, that is, the record required under the law? What is that book there, as you understand it?

A. That is the county clerk's account book, as he kept it at that time.

Q. Account book?

A. As I understand it. It does not give the semi-annual statements as we give them today.

Q. You are familiar with the statutes, are you not, about semi-annual statements?

The COURT: You need not ask a question of law.

To which ruling of the court the plaintiff by counsel then and there duly excepted.

78 Q. This book is kept by the clerk, and not signed by the board of county commissioners, or the chairman of the board?

A. I never examined the books, Mr. Parks, to know whether the county commissioners ever signed it. I cannot swear as to whether they have signed some of the work there in that book or not.

Q. Well, there is another book in which you record semi-annual statements, is there not?

A. Yes, sir.

Q. This is not that book?

A. This is not such book.

Redirect examination.

By W. H. BRYANT, Esq.:

Q. This is the semi-annual statement as kept at that time?

A. Yes, sir.

Q. Do the ones that you keep now—do you require the county commissioners to sign them?

A. I have never required the county commissioners to sign them.

Q. Not required by law?

A. No, sir.

Recross-examination.

By D. E. PARKS, Esq. :

Q. What do you mean by semi-annual statements, when you say this book shows the semi-annual statements?

A. I say, as I understand it, at that time.

Q. Show me where that book contains a semi-annual statement?

A. I do not know anything about that, their method of keeping them, except as the figures show.

Q. Then you cannot say that it contains a semi-annual statement?

A. Not as they (make) it out then; not as they made it out then.

Mr. BRYANT: We offer the original book, and substitute this copy.

Mr. JOHNSON: We object to the introduction of this record of the outstanding indebtedness; it is not a semi-annual statement signed by the board of county commissioners, and recorded in a book kept for that purpose, within the intent, purpose and meaning of the statute requiring such a record to be kept. There is no evidence of its record as such.

Objection overruled. To which ruling of the court the plaintiff by counsel then and there duly excepted, and exceptions were allowed by the court.

79 Said exhibit was then introduced in evidence and was marked Exhibit 9 and was in words and figures as follows:

EXHIBIT 9.

Lake County in Account with County Treasurer.

Expenditure (-count) to January 1st, A. D. 1880, county fund.

1880.

Jan. 1.

County clerk's fees.....

1,150.00

County assessor's fees.....

2,467.93

County attorney's fees.....

1,300.28

Sheriff's fees.....

9,906.77

County physician's fees.....

729.67

County school supt's fees.....

75.00

County comm. fees.....

2,574.77

County surveyor's fees.....

347.00

County cor. and com. fees.....

1,322.75

Justice fees.....

3,378.75

Constable fees.....

1,171.35

Justice court fees.....

1,092.85

District court fees.....

8,686.30

County court fees.....

503.44

County jail expenses.....

15,913.91

Expense of Co. prisoners.....

1,768.70

County poor expenses.....

11,709.17

Purchase of court-house.....

10,552.00

Books and stationery for Co.

offices.....

5,811.86

County printing.....

863.73

Furniture and repair Co.

offices.....

5,697.16

Transcript of record.....

6,349.05

County gauger's expenses.....

379.32

Auditing accounts between

Lake and Chaffee counties....

975.00

Election expenses.....

1,036.80

Commissioners' expenses.....

50.00

Interests paid on warrants.....

182.61

96,074.24

1880.

Jan. 1.

By amount of warrants can.....

11,777.96

" " By outstanding indebtedness of

Lake county in county war-

rants, January 1, A. D. 1880,

to balance

84,296.28

96,074.24

LAKE, STATE OF COLORADO, VS. HARRY H. DUDLEY.

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Expenditure Account, Road Fund.

1880.	1880.
Jan. 1. Total expenditure on county roads in repairing, making and bridging.....	Jan. 1. By (and) of road warrants can. 2,320.
Interest paid on warrants.....	By outstanding indebtedness of Lake county, in road warrants, January 1, A. D. 1880, to balance.....
4,161.84	1,850.53
69.28	
4,171.12	4,171.12

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Expenditure Account to July 1st, A. D. 1880, County Fund.

1880.	1880.
July 1. Warrants outstanding.....	Feb. 4. Warrant No. 1648 can.....
Jan. 1. County clerk's fees.....	" " Warrant No. 1725 can.....
" judge's ".....	" 19. Warrant No. 1886 can.....
" sheriff's ".....	May 3. Warrant No. 2654 can.....
" commissioners' fees.....	Amount of warrants paid in for taxes and cancelled.....
County commissioners' expenses.....	Amount of warrants paid in for licenses and cancelled.....
County attorney's fees.....	Outstanding indebtedness of Lake county in county warrants July 1st, A. D. 1880.....
County treasurer's fees.....	
County assessor's fees.....	
County physician's fees.....	
County coroner fees.....	
County coroner court fees.....	
County school sup't fees.....	
County surveyor fees.....	
County pauper expenses.....	
County justice fees.....	
County justice court expenses.....	
County printing.....	
County books and stationery.....	
County jail expenses.....	
" wood.....	
" offices ".....	
Building purchase.....	
County clerk district court.....	
County district court expenses.....	
County prosecuting attorney.....	
County election expenses.....	
County supplies.....	
" rent of offices.....	
Lost warrants.....	
Constables' fees.....	
Transcript county records.....	
Public buildings.....	
Militia expense.....	
County water.....	
Purchase of lots.....	
Tax refunded.....	
County court expenses.....	
Rewriting plats.....	
County gas.....	
" road expenses.....	
Forward.....	Forward.....
\$203,069.62	\$217,057.75
81 To forward.....	By forward.....
" prosecuting witness.....	\$217,057.75
To poor-house expenses.....	
To sheriff's posse.....	
" special attorney.....	
To court-house expenses.....	
To burning dead horses.....	
To interest paid on county warrants.....	
588.78	
\$217,057.75	To page 4.....
	\$217,057.75

Expenditure Account, Road Fund.

To warrants outstanding January 1, 1880.....	By amount of road warrants cancelled..
To expenditures on county roads in repairing, making, bridging, &c.....	Outstanding indebtedness of Lake county in road warrants July 1st, A. D. 1880.....
To interest paid on warrants.....	
410.45	10,165.17
9,047.17	752.98
\$10,918.15	To page 5.....
	\$10,918.15

Expenditure Account, County Building Fund.

To warrants issued for purchase of block No. 21.....	9,600.00	By warrants cancelled.....	9,600.00
	<u>\$9,600.00</u>		<u>\$9,600.00</u>

Expenditure Account, Contingent Fund.

To expense of prisoners.....	\$325.25	By warrants cancelled and paid in.....	1,490.88
paupers.....	701.28		
county officers.....	320.35		
special dep. assessor.....	144.00		
	<u>\$1,490.88</u>		<u>\$1,490.88</u>

Expenditure Account, County Bond Fund.

To bonds issued.....	10,750.00	By outstanding bonds July 1, 1880.....	10,750.00
	<u>\$10,750.00</u>	To page 5.....	<u>\$10,750.00</u>

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Lake County in Account with County Treasurer.

Expenditure account to January 1st, A. D. 1881, county fund.
1880.

County clerk's fees and expenses.....	2,371.49	By order of board:	
Assessor's fees.....	3,433.40	July 12. War. No. 280 can.....	322.00
Sheriff fees.....	5,161.88	" " " " 3781 ".....	76.20
Coroner's fees.....	1,604.10	Aug. 14. " " 4080 ".....	168.58
Coroner's court fees.....	1,538.86	Sept. 9. " " 4467 ".....	90.90
County commissioners' fees.....	1,675.25	" " " " 4482 ".....	500.00
Constable fees.....	6,393.55	Nov. 18. " " 4977 ".....	807.70
Justice fees.....	6,291.10	" 19. " " 4078 ".....	360.60
Justice court fees.....	1,565.06	Amount of warrants paid in	
County physician.....	2,349.55	for taxes and cancelled.....	14,084.58
Expense for paupers.....	16,195.60	Warrants paid in cash and	
Court-house expenses.....	3,492.64	cancelled.....	2,838.19
Special sheriff fees.....	1,569.40	Warrants paid in for rent and	
County attorney fees.....	4,791.82	cancelled.....	110.48
Special attorney ".....	1,471.95	Amount of warrants paid in	
District clerk fees.....	2,923.70	for license and cancelled....	2,325.00
" court expenses.....	4,808.40	Outstanding indebtedness of	
Duplicate warrants.....	84.00	Lake county in county war-	
County officers' expenses.....	18,135.23	rants Jan'y 1, A. D. 1881,	
County jail.....	4,806.01	without accrued interest....	293,061.20
Stationery Co. officers.....	4,743.46		
Miscellaneous acct's.....	2,240.84		
County school -sup't.....	1,009.50		
County treas. fees.....	6,376.74		
County court expenses.....	158.90		
County judge fees.....	93.15		
Boarding prisoners.....	4,303.60		
Stenographer.....	160.00		
Board for guard.....	395.45		
Prisoners to Canon.....	1,511.10		
Election expense.....	4,183.60		
Interest paid on county warrants.....	1,217.53		
Warrants outstanding July 1, 1880.....	198,394.57		
	<u>314,456.73</u>	To page 6.....	<u>314,456.73</u>

*Lake County in Account with County Treasurer.**Expenditure account, road fund.*

To amount warrants outstanding July 1st, 1880.....	752.98	By amount of road } paid in.....	1,946.75
Expenditure on county roads, repair- ing bridging, &c.....	20,212.39	Warrants cancelled.....	450.90
Interest paid on warrants.....	31.66	Outstanding indebtedness of Lake county in road warrants January 1, 1881.....	19,499.38
	<u>20,997.03</u>	To page 7.....	<u>20,997.03</u>

Expenditure Account, County Building Fund.

To warrants issued from July 1, 1880, to Jan'y 1, 1881.....	37,147.01	By warrants paid in cash and can- celled.....	37,251.99
Interest p'd on warrants.....	225.63	Warrants out-standing January 1, 1881..	120.65
		To page 7.	

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Expenditure Account, County Bond Fund.

To bonds outstanding July 1st, 1880...	10,756.00	By bonds outstanding Jan'y 1st, 1881..	50,000.00
Bonds issued to Jan'y 1, 1881.....	39,250.00		
1881.	50,000.00		50,000.00
Jan'y 1. To bonds outstanding.....	50,000.00		

STATE OF COLORADO, }
County of Lake, } ss :

I, J. W. Newell, clerk and recorder in and for said county, in the State aforesaid, do hereby certify that the within and foregoing is a true and correct copy of the expenditure, accounts and indebtedness of the county of Lake from Jan'y 1, 1880, to Jan'y 1, 1881, as it appears of record in my office in county clerk's account book, page 1 to 5 (inc.).

Witness my hand and official seal this twelfth day of January, 1894.

[Seal of Lake County, State of Colorado.]

J. W. NEWELL,
Clerk and Recorder,
By R. O. NORTH, Deputy.

Indorsed: 2758. U. S. circuit court. H. H. Dudley vs. Lake County. Expenditure indebtedness acc't of Lake Co. for 1880. Filed Jan. 24, 1894. Robert Bailey, clerk U. S. circuit court. Thomas, Bryant & Lee, def't's att'ys.

Mr. BRYANT: We offer in evidence a transcript from the records of Lake county, showing the issuance of county warrants of the county, the amount of them from day to day, the numbers of them, &c., certified to by the county clerk and recorder, beginning on the 7th day of October, 1879, and ending with the 31st day of December, 1879. They have various other certificates here, of other dates; here is one on the 30th day of January, 1880, and I think it runs up to and includes the 1st day of—at any rate, it goes up to the date of the issuance of these bonds.

The COURT: It shows what amount?

Mr. BRYANT: Well, it varies—I have got a summary of it here, showing the total indebtedness from October 7, 1879, to December 31, 1879, and from June 30, 1880, to December 31, 1880; and this is certified to by the county clerk as being a summary of the warrants themselves, taken from the warrant register.

84 Plaintiff objected because incompetent and immaterial; not the best and proper evidence.

Objection overruled. To which ruling of the court the plaintiff
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by counsel then and there duly excepted and exceptions were allowed by the court.

Said exhibits offered in evidence are in words and figures as follows, to wit:

(EXHIBIT 10.)

In the Circuit Court of Appeals within and for the Eighth Judicial Circuit.

HARRY H. DUDLEY, Plaintiff,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE,
Colorado, Defendant in Error. }

It is hereby stipulated and agreed by and between the plaintiff in error and the defendant in error in the above-entitled cause, that Exhibit No. 10 which was introduced in evidence in the trial of said cause by the defendant in error, consists of a certified copy of the warrant register of Lake county, Colorado, for the period beginning June 30th, 1879, and ending December 31st, 1880, and in substance shows the following facts: That the total outstanding warrants issued by Lake county, consisting of promises to pay that amount of money, and purporting to represent the indebtedness of Lake county, consisted of the following sums upon the following dates: June 30, 1879, \$33,432.98; October 7th, 1879, \$58,382.46; December 31st, 1879, \$86,146.81; June 30th, 1880, \$209,897.55; December 31st, 1880, \$362,683.23.

And it is further stipulated and agreed that said exhibit shows that the indebtedness between each of the dates above mentioned continually increased until it reached the amount named at the next period of indebtedness; that is to say, the total indebtedness each and every day increased from the sum of \$33,432.98 upon the 30th day of June, 1879, until it reached the sum of \$362,683.22 on the 31st day of December, 1880, and the above sums mentioned on the particular dates simply show the amount of outstanding warrants existing at that particular time.

It is further stipulated and agreed that this summary of Exhibit No. 10 may be printed in the printed transcript of the record in the above-entitled cause and used upon the hearing in lieu of printing said Exhibit Number Ten at length.

DAN'L E. PARKS,

H. B. JOHNSON,

Attorneys for Plaintiff in Error.

GEORGE R. ELDER,

THOMAS, BRYANT & LEE,

Attorneys for Defendant in Error.

No. 821. In the circuit court of appeals, in the eighth judicial circuit. Harry H. Dudley vs. The Board of County Commissioners of the County of Lake, Colorado. Stipulation as to printing. Filed Jul- 23, 1896. John D. Jordan, clerk.

Mr. BRYANT: Now here is a summary of the different accounts which appear in the former offer.

Plaintiff objected because immaterial and incompetent.

Objection sustained. To which ruling of the court the defendant by counsel duly excepted. And said exhibits so excluded are as follows:

* * * * *

Mr. BRYANT: Now I want to offer a certified copy of the various orders made by the county commissioners, and they are numbered from 1 to 13, with the exception of No. 4, which I find relates to another matter—showing the action of the county commissioners in authorizing this bond issue. I introduce them for the purpose of showing that that was a debt created by loan. The first would perhaps cover the whole matter if it is admitted that these bonds were issued in pursuance of them and I do not think there is any question about that. After reciting the preamble, the board resolves, "Whereas, the necessities of Lake county require," &c. Now the records go on and show that an election was had, and the vote of the people was in favor of issuing the bonds and that the bonds were sold, so that it shows altogether that this was the creation of a debt by loan; and we contend that under the first provision of the constitution of the State, that the creation of a loan in any one year, could not exceed \$1.50 per thousand, which would be about \$16,000 for this county; and it brings it within the rule laid down by the Supreme Court, that where it appears on the face of the bond itself that it is beyond that amount, they are void; so that I offer these simply for the purpose of proving that this was the creation of a debt by loan. Said papers so introduced in evidence are in words and figures as follows:

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EXHIBIT 16.

STATE OF COLORADO, }
County of Lake, } ss:

At a special meeting of the Board of County Commissioners for Lake County, Colorado, held at the court-house, in the city of Leadville, on the fourth day of September, A. D. 1879, there were present:

Jos. H. Pearce, chairman;

Benj. Barnard, commissioner;

— — —, county attorney;

Jos. H. Wells, clerk;

when the following proceedings, among others, were had and done, to wit:

On motion it is ordered by the board that whereas, the necessities of Lake county require the erection of public buildings and the building and construction of public roads and bridges, and there are no moneys in the treasury of said county to meet the necessary outlay required for said purposes and a loan of a sufficient sum is required to meet such expenditures, and whereas, the creation of

such an indebtedness for those purposes is deemed necessary by this board and expedient at this time to appreciate the value of the obligations of said county:

It is therefore ordered by this board that the amount of money required for the erection of public buildings is the sum of fifty thousand dollars (\$50,000) and for the building and construction of roads and bridges is the sum of five thousand dollars (\$5,000.00) and it is further ordered that the question of making such loan on the account of the county be and the same is hereby submitted to a vote of the electors of said county qualified to vote on said question at the next general election to be held in said county on the 7th day of October next in accordance with the general laws of Colorado in such case made and provided. It is further ordered that the clerk of said county be and he is hereby authorized and directed to give and publish the notice of this submission to the electors of said county as the law requires.

JOS. PEARCE, *Chm.*

Attest: JOS. H. WELLS, *Clerk.*

STATE OF COLORADO, }
County of Lake, } ss:

I, C. H. S. Whipple, county clerk and *ex officio* clerk of the Board of County Commissioners in and for the County and State aforesaid, do hereby certify that the annexed and foregoing order is
87 truly copied from the records of the proceedings of the Board of County Commissioners for said Lake County, now in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said county, at Leadville, this fourteenth day of November, A. D. 1893.

C. H. S. WHIPPLE,
County Clerk,

Per JNO. T. JOYCE, *Deputy.*

[Seal of Lake County, State of Colorado.]

Indorsed: Certified copy of order—Book 2, page 65—made by the Board of County Commissioners of Lake County, Colorado, Sept. 4, 1879. Ordered that \$55,000 be submitted to vote of the people. Filed Dec. 21, 1893. Robert Bailey, clerk U. S. circuit court.

EXHIBIT 17.

Commissioners' record.

Book No. 2, page No. 94. Copy.

LEADVILLE, October 27, A. D. 1879.

The board met pursuant to adjournment.

Present: Same officers as on previous session. (Record shows that members present at said previous meeting were Jos. Pierce, chairman, Geo. M. Gerrish, member; R. T. Taylor, member; Jos. H. Wells, clerk; E. T. Wolverton, deputy.)

Whereas an order was made by and entered of record in the proceedings of this board on the 4th day of September, A. D. 1879, of which the following is a copy :

Whereas, the necessities of Lake county require the erection of public buildings, and the buildings and construction of public roads and bridges, and there are no moneys in the treasury of said county to meet the necessary outlay required for such purposes, and a loan of a sufficient sum is required to meet such expenditures ; and

Whereas, the creation of such an indebtedness for those purposes is deemed necessary by this board and expedient at this time to appreciate the value of the obligations of said county.

It is therefore ordered by this board that the amount of money required for the erection of public buildings is the sum of fifty thousand dollars (\$50,000.00) and for the building and construction of roads and bridges is the sum of five thousand dollars (\$5,000).

And it is further ordered that the question of making such loan on account of the county be and the same is hereby submitted to a vote of the electors of said county qualified to vote on said question at the next general election to be held in said county on

88 the seventh day of October next in accordance with the general laws of Colorado in such case made and provided.

It is further ordered that the clerk of said county be and he is hereby authorized and directed to give and publish the notice of submission to the electors of said county as the law requires.

And whereas, satisfactory evidence is adduced before this board of a full compliance with said order in relation to the submission of the question of making said loan to a vote of the electors of the county qualified to vote on the question at the general election held in said county on October 7th, A. D. 1879, and with the laws of Colorado in such case made and provided.

And whereas, it appears that in pursuance of the said order the clerk of said county caused a notice of such order of which the following is a copy, to wit :

Notice.

To qualified electors :

Notice is hereby given to the electors of Lake county qualified to vote on the question that at a meeting of the Board of County Commissioners of said County of Lake held at Leadville in said county on the 4th day of September, A. D. 1879, an order was made by said board and entered of record in the proceedings of said board of which the following is a copy :

Whereas, the necessities of Lake county require the erection of public buildings and the building and construction of public roads and bridges, and there are no moneys in the treasury of said county to meet the necessary outlay required for said purposes and a (lone) of a sufficient sum is required to meet (sich) expenditures ; and

Whereas, the creation of such an indebtedness for those purposes is deemed necessary by this board, and expedient at this time to appreciate the value of the obligations of said county ; it is therefore ordered by this board that the amount of money required for

the erection of public buildings is the sum of fifty thousand dollars (\$50,000.00) and for the building and construction of roads and bridges is the sum of five thousand dollars (\$5,000);

And it is further ordered that the question of making such loan on the account of the county, be and the same is hereby submitted to a vote of the electors of said county, qualified to vote on said question at the next general election, to be held in said
89 county on the seventh day of October next, in accordance with the general laws of Colorado, in such case made and provided.

It is further ordered that the clerk of said county be and he is hereby authorized and directed to give and publish the notice of submission to the electors of said county, as the law requires, and that in pursuance of said order, a vote of said electors will be taken by the judges of election, at the respective polling places in the several election precincts of said county, at the general election to be held on Tuesday, October 7, A. D. 1879.

All persons voting on the question shall vote by separate ballot, whereon is placed the words "For county indebtedness" or "Against county indebtedness." And no person shall vote on the question unless he have the necessary qualification of an elector as provided by law, and shall have paid a tax upon property assessed to him in the county for the year immediately preceding said election. By order of the Board of County Commissioners of Lake County.

JOSEPH H. WELLS,

County Clerk and ex Officio Clerk of said Board.

To be posted in a conspicuous place in each voting precinct in this county for at least thirty days preceding said election. And whereas it also appears to this board by the canvass of the votes cast in said county, on said general election day, upon the question of making such loan, that a majority of all the votes cast are for county indebtedness and that thereby, under the constitution and laws of Colorado, this board is authorized to contract said debt in the name of the county for said specified purposes. It is therefore ordered by this board as follows, to wit:

First. That the bonds of Lake county to the amount of ten thousand seven hundred and fifty dollars (\$10,750.00) be made and issued, and a loan of money effected thereon, to be used for the purpose of erecting necessary public buildings.

Second. That said bonds, so to be issued, shall be in form and in the words and figures, as follows:

No. —.

\$—.

Lake County Bond.

The County of Lake, Colorado,

Is hereby bound, and promises to pay to — or bearer the sum of — dollars at its pleasure, ten years after date, but
90 absolutely twenty years after date with interest thereon annually, on the first day of April in each year at the rate of

ten per cent. per annum from date until paid. Said principal is payable on presentation of this bond, when due, or when called in by the county for redemption after ten years; and said interest is payable as it falls due, on presentation of the coupons hereto attached, at the office of the county treasurer of said county. Issued by order of the Board of County Commissioners of Lake County at Leadville in said county this — day of —, A. D. 18—.

Attested and sealed by—

_____,
County Clerk.

_____,
Chairman of the Board.

Third. That said bonds shall be coupon bonds, payable at the pleasure of the county ten years after the date of their issuance, but absolutely due and payable twenty years after such date.

Fourth. That there shall be annexed to each bond so issued twenty coupons upon which the annual interest as it falls due on said bonds, shall be payable on presentation thereof to the treasurer of Lake county, on the first day of April in each and every year, said coupons shall be numbered from one to twenty in the order in which they become due and be in form and in words and figures, as follows:

Coupon No. — to Lake County Bond No. —.

§—.

To the treasurer of Lake county, Colorado:

On or after April 1, pay to — or bearer, the sum of — dollars — for annual interest due on Lake county bond No. — issued —, A. D. 18— and charge same to account of public building fund. Issued — by order of the Board of Commissioners of Lake County, at Leadville, Colo., —, A. D. 18—.

_____,
Chairman of Board.

Attest: _____,
County Clerk.

Fifth. The annual interest on said bond is fixed and allowed at the rate of ten per cent. (10 %) per annum from their date until paid.

Sixth. That the interest on said bonds shall be payable annually, on the first day of April of each year, and the principal sum due or called in for redemption at the office of the county treasurer of said county of Lake.

Seventh. Said bonds shall each be signed by the chairman of this board, attested by the clerk of the county of Lake, bear the seal of said county countersigned, numbered and registered by the county treasurer and numbered and registered by the county clerk in a book to be kept for that purpose by each of said officers, in the order in which they are issued. Each bond shall state upon its face the amount for which the same is issued, to whom

issued and the date of its issuance, but no bond shall be of less denomination than fifty dollars (\$50.00) said bonds so to be issued shall be for the following denominations, viz., seventeen bonds for one hundred dollars (\$100.00) one bond for fifty dollars (\$50.00), twelve bonds for five hundred dollars (\$500) each and twelve bonds for the sum of two hundred and fifty (\$250.00) each.

STATE OF COLORADO, }
County of Lake, } ss :

I, C. H. S. Whipple, county clerk and *ex officio* clerk of the Board of County Commissioners in and for the County and State aforesaid, do hereby certify that the annexed and foregoing order is truly copied from the records of the proceedings of the Board of County Commissioners for said Lake County, now in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said county,
Seal of Lake County, State of Colorado, at Leadville, this 15th day of November, A. D. 1893.

C. H. S. WHIPPLE,
County Clerk,
Per JNO. T. JOYCE, Deputy.

Indorsed : No. 2. Commissioners' Record, Book No. 2, page No. 94. Copy. Oct. 27, 1879. Vote counted; bonds ordered issued. 2758. Dudley vs. Lake Co. Filed Dec. 21, 1893. Robert Bailey, clerk U. S. circuit court.

EXHIBIT 18.

STATE OF COLORADO, }
County of Lake, } ss :

At a special meeting of the Board of County Commissioners of Lake County, Colorado, held at the court-house, in the city of Leadville, on the seventeenth day of March, A. D. 1880, there were present :

Jos. Pearce, chairman,
J. H. Willard, commissioner,
G. M. Gerrish, "
— — —, county attorney,
Joseph H. Wells, clerk,
E. T. Wolverton, deputy,

when the following proceedings, among others, were had and done, to wit :

On motion, it is ordered that the bid of Walter H. Jones of 95c. on the dollar for the bonds heretofore issued by the county
92 for the sum of \$10,750, be and is hereby accepted and that the said bonds be delivered to him on his paying into the county (treasurer) the sum of \$10,212.50 in cash to credit of the public building fund.

STATE OF COLORADO, }
 County of Lake, } ss:

I, C. H. S. Whipple, county clerk and *ex officio* clerk of the Board of County Commissioners in and for the county and State aforesaid, do hereby certify that the annexed and foregoing order is truly copied from the records of the proceedings of the Board of County Commissioners for said Lake County, now in my office.

In witness whereof I have hereunto set
 Seal of Lake County, my hand and affixed the seal of said county,
 State of Colorado. at Leadville, this 15th day of November,
 A. D. 1893.

C. H. S. WHIPPLE,
County Clerk,

Per JNO. T. JOYCE, *Deputy.*

Indorsed: No. 3. Certified copy of order—Book 2, page 181—made by the Board of County Commissioners of Lake County, Colorado, March 17, 1880. Bid of Walter H. Jones for \$10,750 at 95c. accepted. Filed Dec. 21, 1893. Robert Bailey, clerk U. S. circuit court.

EXHIBIT 19.

Commissioners' Record.

Book No. 2, page No. 208.

Copy.

At a meeting of the Board of County Commissioners of Lake County, held in the office of said board at Leadville, Lake County, April 27th, A. D. 1880.

Present: G. M. Gerrish, chairman *pro tem.*

J. H. Willard, member,

O. M. Dearborn, "

Frank T. Caley, "

Jos. H. Wells, clerk,

E. T. Wolverton, deputy.

On motion it is ordered by this board that the order heretofore made by this board dated October 27th, A. D. 1879, and entered of record in the proceedings of this board at pages 94, 95, 96, and 97 of said proceedings in the words and figures following:

93 Whereas an order was made by and entered of record in the proceedings of this court on the 4th day of September, A. D. 1879, of which the following is a copy:

Whereas, the necessities of Lake county require the erection of public buildings, and the building and construction of public roads and bridges and there are no moneys in the treasury of said county to meet the necessary outlay required for such purposes and a loan of a sufficient sum is required to meet such expenditure, and

Whereas, the creation of such an indebtedness for those purposes is deemed necessary by this board and expedient at this time to appreciate the value of the obligations of said county.

It is therefore ordered by this board that the amount of money required for the erection of public buildings is the sum of fifty thousand dollars (\$50,000.00) and for the building and construction of roads and bridges is the sum of five thousand dollars (\$5,000.00).

And it is further ordered that the question of making such loan on account of the county be, and the same is hereby, submitted to a vote of the electors of said county, qualified to vote on said question at the next general election to be held in said county on the seventh day of October next in accordance with the general laws of Colorado, in such case made and provided.

It is further ordered that the clerk of said county be, and he is hereby, authorized and directed to give and publish the notice of submission to the electors of said county as the law requires.

And whereas satisfactory evidence is adduced before this board of a full compliance with said order in relation to the submission of the question of making said loan to a vote of the electors of this county qualified to vote on the question at the general election held in said county on October 7th, A. D. 1879, and with the laws of Colorado in such case made and provided.

And whereas, it appears that in pursuance of the said order the clerk of said county caused a notice of such order of which the following is a copy, to wit :

Notice.

To qualified electors :

Notice is hereby given to the electors of Lake county qualified to vote on the question that at a meeting of the Board of County Commissioners of said County of Lake, held at Leadville in said county on the 4th day of September, A. D. 1879, an order was made by said board and entered of record in the proceedings of said board of which the following is a copy :

Whereas the necessities of Lake county require the erection of public buildings, and the building and construction of public roads and bridges, and there are no moneys in the treasury of said county to meet the necessary outlay required for said purposes and a loan of a sufficient sum is required to meet such expenditures, and

Whereas, the creation of such an indebtedness for these purposes is deemed necessary by this board and expedient at this time to appreciate the value of the obligations of said county ; it is therefore ordered by this board that the amount of money required for the erection of public buildings is the sum of fifty thousand dollars (\$50,000.00) and for the building and construction of roads and bridges is the sum of five thousand dollars (\$5,000.00).

And it is further ordered that the question of making such loan on the account of the county be, and the same is hereby, submitted to a vote of the electors of said county, qualified to vote on said question at the next general election to be held in said county on the seventh day of October next, in accordance with the general laws of Colorado, in such case made and provided.

It is further ordered that the clerk of said county be, and he is

hereby, authorized and directed to give and publish the notice of submission to the electors of said county as the law requires.

And that in pursuance of said order a vote of said electors will be taken by the judges of election at the respective polling places in the several election precincts of said county at the general election to be held on Tuesday, October 7, A. D. 1879. All persons voting on that question shall vote by separate ballot, whereon is placed the words "For county indebtedness" or "Against county indebtedness." And no person shall vote on the question unless he have the necessary qualification of an elector as provided by law, and shall have paid a tax upon property assessed to him in the county for the year immediately preceding said election.

By order of the Board of County Commissioners of Lake County.

JOSEPH H. WELLS,

County Clerk and ex Officio Clerk of said Board.

95 To be posted in a conspicuous place in each voting precinct in this county, for at least thirty days preceding said election.

And whereas it also appears to this board by the canvass of the votes cast in said county on said general election day upon the question of making such loan that a majority of all the votes cast are for county indebtedness and that thereby under the constitution and laws of Colorado, this board is authorized to contract said debt in the name of the county for said specified purposes.

It is therefore ordered by this board as follows, to wit:

First. That the bonds of Lake county to the amount of ten thousand seven hundred and fifty dollars (\$10,750.00) be made and issued and a loan of money effected thereon to be used for the purpose of erecting necessary public buildings.

Second. That said bonds so to be issued shall be in form and in the words and figures as follows:

No. —.

\$—.

Lake County Bond.

The County of Lake, Colorado,

Ishereby bound and promises to pay to ——— or bearer the sum of — dollars at its pleasure ten years after date, but absolutely twenty years after date, with interest thereon annually on the first day of April in each year at the rate of ten per cent. per annum from date until paid. Said principal is payable on presentation of this bond when due, or when called in by the county for redemption after ten years; and said interest is payable as it falls due on presentation of the coupons hereto attached, at the office of the county treasurer of said county. Issued by order of the Board of County Commissioners of Lake County at Leadville in said county this — day of —, A. D. 18—.

Attested and sealed by—

_____,
County Clerk.

_____,
Chairman of the Board.

Third. That said bonds shall be coupon bonds, payable at the pleasure of the county ten years after the date of their issuance, but absolutely due and payable twenty years after such date.

Fourth. That there shall be annexed to each bond so issued twenty coupons upon which the annual interest as it falls due on said bonds shall be payable on presentation thereof to the treasurer of Lake county on the first day of April in each and every year; said
96 coupons shall be numbered from one to twenty in the order in which they become due and be in form and in words and figures as follows:

Coupon No. — to Lake County Bond No. —.

§—.

To the treasurer of Lake county, Colorado:

On or after April 1, —, pay to — or bearer, the sum of — dollars — for annual interest due on Lake county bond No. — issued —, A. D. 18—, and charge same to account of public building fund. Issued — by order of the Board of Commissioners of Lake County at — Leadville, Col., —, A. D. 18—.

—,
Chairman of Board.

Attest:

—,
County Clerk.

Fifth. The annual interest on said bonds is fixed and allowed at the rate of ten per cent. (10%) per annum from their date until paid.

Sixth. That the interest on said bonds shall be payable annually on the first day of April of each year, and the principal sum due or called in for redemption at the office of the county treasurer of said county of Lake.

Seventh. Said bonds shall each be signed by the chairman of this board attested by the clerk of the county of Lake bear the seal of said county, countersigned, numbered and registered by the county treasurer and numbered and registered by the county clerk in a book to be kept for that purpose by each of said officers, in the order in which they are issued. Each bond shall state upon its face the amount for which the same is issued, to whom issued, and the date of its issuance, but no bond shall be of less denomination than fifty dollars (\$50.00) said bonds so to be issued shall be for the following denominations, viz: seventeen bonds for one hundred dollars (\$100.00) one bond for fifty dollars (\$50.00) twelve bonds for five hundred dollars (\$500) each and twelve bonds for the sum of two hundred and fifty — (\$250.00) each. Be and the same is hereby re-enacted and adopted to issue the additional bonds of this county for the additional sum of ten thousand seven hundred and fifty dollars (\$10,750) and that the committee of ways and means of this board be and they are hereby authorized and directed to take charge of the issue of said bonds receive the same and negotiate a sale of them for the highest and best price that can be obtained for the

same, and deposit the proceeds of the sale in the treasury to the credit of the public building fund to the use of the county.

STATE OF COLORADO, }
County of Lake, } ss :

I, C. H. S. Whipple, county clerk and *ex officio* clerk of the Board of County Commissioners in and for the County and State
97 aforesaid, do hereby certify that the annexed and foregoing order is truly copied from the records of the proceedings of the Board of County Commissioners for said Lake County, now in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said county, at Leadville, this seventeenth day of November, A. D. 1893.

[Seal of Lake County, State of Colorado.]

C. H. S. WHIPPLE,

County Clerk,

By MARK E. CARR, *Deputy.*

Indorsed: No. 5. Commissioners' Record, Book No. 2, page No. 208. Copy. Dated Apr. 27, 1880. Order of Oct. 27, '79. Re-enacted to apply to additional sum of \$10,750. 2758. Dudley vs. Lake Co. Filed Dec. 21, 1893. Robert Bailey, clerk U. S. circuit court.

EXHIBIT 20.

Commissioners' Record.

Book No. 2, page No. 289.

Copy.

LEADVILLE, *July 14th, A. D. 1880.*

Board met pursuant to adjournment.

Jos. Pearce, chairman,

O. M. Dearborn, member,

J. H. Willard, member,

Jos. H. Wells, clerk.

E. T. Wolverton, deputy.

On motion the order heretofore made by this board in regard to the issuance of bonds, at their meeting held April 27th, A. D. 1880, and entered of record in Book 2 at page 209 of Lake county records is hereby ordered rescinded.

On motion it is ordered by this board that the order heretofore made by this board, dated October 29th, 1879, and entered of record in the proceedings of this board at pages 94, 95, 96 and 97 of said proceedings in the words and figures following:

Whereas an order was made by and entered of record in the proceedings of this board, on the 4th day of September A. D. 1879 of which the following is a copy:

Whereas the necessities of Lake county require the erection of

98 public buildings and the building and construction of public roads and bridges, and there are no moneys in the treasury of said county to meet the necessary outlay required for such purposes, and a loan of a sufficient sum is required to meet such expenditures, and

Whereas the creation of such an indebtedness for those purposes is deemed necessary by this board, and expedient at this time to appreciate the value of the obligations of said county.

It is therefore ordered by this board that the amount of money required for the erection of public buildings is the sum of fifty thousand dollars (\$50,000.00) and for the building and construction of roads and bridges, is the sum of five thousand dollars (\$5,000.00).

And it is further ordered that the question of making such loan on the account of the county, be and the same is hereby submitted to a vote of the electors of said county qualified to vote on said question at the next general election to be held in said county on the seventh day of October next in accordance with the general laws of Colorado, in such case made and provided. It is further ordered that the clerk of said county be and he is hereby authorized and directed to give and publish the notice of submission to the electors of said county as the law required.

And whereas satisfactory evidence is adduced before this board of a full compliance with said order in relation to the submission of the question of making said loan to a vote of the electors of this county qualified to vote on the question at the general election held in said county on October 7th A. D. 1879 and with the laws of Colorado in such case made and provided, and whereas it appears that in pursuance of the said order the clerk of said county caused a notice of such order of which the following is a copy to wit:

Notice.

To qualified electors:

Notice is hereby given to the electors of Lake county qualified to vote on the question that at a meeting of the Board of County Commissioners of said County of Lake, held in Leadville in said county on the 4th day of September A. D. 1879 an order was made by said board, and entered of record in the proceedings of said board of which the following is a copy:

99 Whereas the necessities of Lake county require the erection of public buildings and the building and construction of public roads and bridges and there are no moneys in the treasury of said county to meet the necessary outlay required for said purposes, and a loan of a sufficient sum is required to meet such expenditures, and whereas the creation of such indebtedness for those purposes is deemed necessary by this board, and expedient at this time, to appreciate the value of the obligations of this county; it is therefore ordered by this board that the amount of money required for the erection of public buildings is the sum of fifty thousand (\$50,000.00) dollars and for the building and construction of roads and bridges is the sum of five thousand dollars (\$5,000.00).

And it is further ordered that the question of making such loan on the account of the county be and the same is hereby submitted to a vote of the electors of said county, qualified to vote on said question at the next general election to be held in said county on the seventh day of October next in accordance with the general laws of Colorado, in such case made and provided.

It is further ordered that the clerk of said county be and he is hereby authorized and directed to give and publish the notice of submission to the electors of said county as the law requires.

And that in pursuance of said order a vote of said electors will be taken by the judges of election at the respective polling places in the several election precincts of said county, at the general election to be held on Tuesday, October 7th, A. D. 1879.

All persons voting on that question shall vote by separate ballot, whereon is placed the words "For county indebtedness" or "Against county indebtedness," and no person shall vote on the question unless he have the necessary qualifications of an elector as provided by law and shall have paid a tax upon property assessed to him in the county for the year immediately preceding said election.

By order of the Board of County Commissioners of Lake county.

JOS. H. WELLS,

County Clerk and ex Officio Clerk of said Board.

To be posted in a conspicuous place in each voting precinct in this county, for at least thirty days preceding said election.

And whereas it also appears to this board by the canvass of the votes cast in said county on said general election day upon the question of making such loan that a majority of all the votes cast are for county indebtedness, and that thereby under the constitution and laws of Colorado, this board is authorized to contract said debt in the name of the county for said specified purposes.

100 It is therefore ordered by this board as follows, to wit:

First. That the bonds of Lake county to the amount of thirty-nine thousand two hundred and fifty dollars (\$39,250.00) be made and issued and a loan of money effected thereon to be used for the purpose of erecting necessary public buildings.

Second. That said bonds so to be issued shall be in form and in the words and figures as follows:

\$1,000.00. UNITED STATES OF AMERICA. \$1,000.00.

No. —. *Bonds of Public Buildings.*

UNITED STATES OF AMERICA, *County of Lake, State of Colorado.*

Know all men by these presents, that the county of Lake, in the State of Colorado, acknowledges itself to be indebted in the sum of one thousand dollars, lawful money of the United States for value received which sum of money said Lake county hereby promises to pay to ——— or bearer, at the office of the treasurer of Lake county with interest thereon at the rate of ten per cent. per annum, which interest shall be payable annually on the first day of April of each year,

at the office of the treasurer of Lake county, upon the surrender of the coupons hereunto annexed, as they mature, until the payment of said principal sum. This bond to be payable at the pleasure of the county, after ten years from the date of its issuance, but absolutely due and payable twenty years after the date of issue.

This bond is one of a series of fifty thousand dollars, which the board of county commissioners of said county are authorized to issue for the purpose of erecting necessary public buildings by virtue of and in compliance with a vote of a majority of the qualified voters of said county, at an election duly held on the 7th day of October, A. D. 1879, and under and by virtue of and in compliance with an act of the General Assembly of the State of Colorado, entitled "An act concerning counties, county officers and county government, and repealing laws on these subjects" approved March 24th, A. D. 1877, and it is hereby certified that all the provision- of said act have been fully complied with by the proper officers, in the issuing of this bond.

In testimony whereof, and in accordance with said act, the county of Lake hereby pledges its full faith, credit and property for the punctual payment of this bond and the interest thereon as aforesaid, and has authorized the same to be signed by the chairman of the board of county commissioners, and attested by the clerk of
101 said county, as witness their hands and seal of said county, executed at Leadville the county-seat of Lake county, this — day of —, A. D. 1880.

[SEAL.]

_____,
Chairman of the Board of County Commissioners.

Attested and sealed by—

_____,
County Clerk.

County of Lake, State of Colorado. \$1,000.00.

Third. That said bonds shall be coupon bonds payable at the pleasure of the county ten years after the date of their issuance, but absolutely due and payable twenty years after such date.

Fourth. That there shall be annexed to each bond so issued eleven coupons upon which the annual interest as it falls due on said bonds shall be payable on presentation thereof to the treasurer of Lake county on the first day of April in each and every year; said coupons shall be numbered from one to eleven in the order in which they become due and be in form and in words and figures as follows:

The County of Lake in the State of Colorado will pay the bearer one hundred dollars at the office of the treasurer of Lake county on the first day of April. Interest on bond No. —.

Attested by—

_____, *Co. Clk.*

_____,
Ch'r'n B'rd Co. Com'rs.

Fifth. The annual interest on said bonds is fixed and allowed at the rate of ten per cent. (10 %) per annum from their date until paid.

Sixth. That the interest on said bonds shall be payable annually on the first day of April of each year and the principal sum due or called in for redemption at the office of the county treasurer of said county of Lake.

Seventh. Said bonds shall each be signed by the chairman of this board, attested by the clerk of the county of Lake, bear the seal of the said county, countersigned, numbered and registered by the county treasurer, and numbered and registered by the county clerk in a book to be kept for that purpose by each of said officers in the order in which they are issued.

Each bond shall state upon its face the amount for which the same is issued, to whom issued and the date of its issuance, but no

bond shall be of less denomination than two hundred and 102 fifty dollars (\$250.00); said bonds so to be issued shall be for the following denominations, viz : thirty-nine bonds for one thousand dollars (\$1,000.00) and one bond for two hundred and fifty dollars (\$250.00) — be and the same is hereby re-enacted and adopted to issue the additional bonds of this county for the additional sum of thirty-nine thousand two hundred and fifty dollars (\$39,250.00) and that the committee of ways and means of this board be and they are hereby authorized and directed to take charge of the issue of said bonds, receive the same, and negotiate a sale of them for the highest and best price that can be obtained for the same, and deposit the proceeds of the sale in the treasury to the credit of the public building fund to the use of the county.

STATE OF COLORADO, }
County of Lake, } ss :

I, C. H. S. Whipple, county clerk and *ex officio* clerk of the Board of County Commissioners in and for the county and State aforesaid, do hereby certify that the annexed and foregoing order is truly copied from the records of the proceedings of the Board of County Commissioners for said Lake County, now in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said county, at Leadville, this seventeenth day of November, A. D. 1893.

C. H. S. WHIPPLE,
County Clerk,
By MARK E. CARR, Deputy.

[Seal of Lake County, State of Colorado.]

Indorsed : No. 6. Commissioners' Record, Book No. 2, page No. 289. Copy. July 14, 1880. Order of Apr. 27, '80, rescinded and something attempted to be done with order of Oct. 27, '79, but just what it is does not appear. Filed Dec. 21, 1893. Robert Bailey, clerk U. S. circuit court. 2758. Dudley vs. Lake Co.

EXHIBIT 21.

STATE OF COLORADO, } ss:
 County of Lake, }

At a meeting of the Board of County Commissioners for Lake County, Colorado, held at the court-house in the city of Leadville, on the 26th day of July, A. D. 1880, there were present:

Jos. Pearce, chairman,
 O. M. Dearborn, commissioner,
 F. T. Caley, commissioner,
 Jos. H. Wells, clerk,
 E. T. Wolverton, deputy,

when the following proceedings, among others, were had and done:

103 Proposition received from L. E. Roberts to buy \$10,250.00 of the new court-house bonds at 95c. he to have 90 days refusal of the balance at the same price.

Moved by Mr. Dearborn that Mr. Roberts' proposition be accepted; carried.

STATE OF COLORADO, } ss:
 County of Lake, }

I, C. H. S. Whipple, county clerk and *ex officio* clerk of the Board of County Commissioners in and for the county and State aforesaid, do hereby certify that the annexed and foregoing order is truly copied from the records of the proceedings of the Board of County Commissioners for said Lake County, now in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said county, at Leadville, this 17th day of November, A. D. 1893.

C. H. S. WHIPPLE,
 County Clerk.

[Seal of Lake County, State of Colorado.]

Indorsed: No. 7. Certified copy of order, Book 2, page —, made by the Board of County Commissioners of Lake County, Colorado, July 26, 1880. Proposition of L. E. Roberts for \$10,250 of bonds at 95c. accepted. 2758. Dudley vs. Lake County. Filed Dec. 21, 1893. Robert Bailey, clerk U. S. circuit court.

* * * * *

EXHIBIT 23.

STATE OF COLORADO, } ss:
 County of Lake, }

At a regular meeting of the Board of County Commissioners for Lake County, Colorado, held at the court-house, in the city of Leadville, on the third day of August, A. D. 1880, there were present:

Jos. Pearce, chairman,
 J. H. Willard, commissioner,
 O. M. Dearborn, commissioner,

Frank T. Caley, commissioner,
 Jos. H. Wells, clerk,
 E. T. Wolverton, deputy,
 when the following proceedings, among others, were had and done,
 to wit:

104 On motion it is ordered by the board that the bid of Mr.
 Roberts of 95c. on the dollar for \$39,250.00 of Lake County
 bonds, be accepted and ordered placed on file.

STATE OF COLORADO, }
 County of Lake, } ss :

I, C. H. S. Whipple, county clerk and *ex officio* clerk of the Board
 of County Commissioners in and for the county and State aforesaid,
 do hereby certify that the annexed and foregoing order is truly
 copied from the records of the proceedings of the Board of County
 Commissioners for said Lake County, now in my office.

In witness whereof I have hereunto set my hand and affixed the
 seal of said county, at Leadville, this 18th day of Nov., A. D. 1893.

C. H. S. WHIPPLE,
 County Clerk.

[Seal of Lake County, State of Colorado.]

Indorsed: No. 9. Certified copy of order—Book 2, page 328—
 made by the Board of County Commissioners of Lake County, Colo-
 rado, Aug. 30, 1880. Bid of L. E. Roberts for \$39,250 at 95c. be
 accepted. 2758. Dudley vs. Lake County. Filed Dec. 21, 1893.
 Robert Bailey, clerk U. S. circuit court.

* * * * *

EXHIBIT 25.

Commissioners' Record.

Book No. 2, page No. 353.

Copy.

At the regular meeting of the board of county commissioners held
 at the rooms of said board September 6th, A. D. 1880, held according
 to law—

Present: Jos. Pearce, chairman,
 Nelson Hallock, member,
 O. M. Dearborn, member,
 J. H. Willard, member,
 Jos. H. Wells, clerk,
 E. T. Wolverton, deputy.

1. On motion of Mr. Dearborn seconded by Mr. Willard it is or-
 dered and resolved that the order of this board having for its object
 and purpose the issue of bonds dated Oct. 27th, A. D. 1879,
 105 and recorded in Book 2 on pages 94, 95, 96, 97 and 98 of the
 county commissioners' record, and the order having for its
 object and purpose the issue of bonds dated July 30th, A. D. 1880,

and recorded in Book 2 aforesaid, on pages 322, 323, 324, 325, 326 and 327 be and the same are hereby rescinded.

2. On motion it is ordered by the board that the following order be entered as a substitute for the two orders last rescinded.

Whereas heretofore, to wit, on the 4th day of September, A. D. 1879, an order was made by this board and entered on the record of the proceedings of this board, of which the following is a copy :

Whereas the necessities of Lake county require the erection of public buildings and the building and construction of public roads and bridges and there are no moneys in the treasury of said county to meet the necessary outlay required for such purposes, and a loan of a sufficient sum is required to meet such expenditures, and

Whereas the creation of such an indebtedness for those purposes is deemed necessary by this board and expedient at this time to appreciate the value of the obligation of said county :

It is therefore ordered by this board that the amount of money required for the erection of public buildings is the sum of fifty thousand dollars and for the building and construction of roads and bridges is the sum of five thousand dollars (\$5,000.00).

And it is further ordered that the question of making such loan on the account of the county be and the same is hereby submitted to a vote of the electors of said county qualified to vote on said question at the next general election to be held in said county on the seventh day of October next in accordance with the general laws of Colorado in such case made and provided.

It is further ordered that the clerk of said county be and he is hereby authorized and directed to give and publish the notice of submission to the electors of said county as the law requires.

And whereas, satisfactory evidence is adduced before this board of a full compliance with said order in relation to the submission of the question of making said loan to a vote of the electors of
106 this county qualified to vote on the question at the general election held in said county on October 7th, A. D. 1879, and with the laws of Colorado in such case made and provided ;

And whereas it appears that in pursuance of the said order the clerk of said county caused a notice of such order, of which the following is a copy, to wit :

Notice.

To qualified electors :

Notice is hereby given to the electors of Lake county qualified to vote on the question that at a meeting of the Board of County Commissioners of said County of Lake held at Leadville, in said county, on the 4th day of September, A. D. 1879, an order was made by said board and entered of record in the proceedings of said board, of which the following is a copy :

Whereas the necessities of Lake county require the erection of public buildings and the building and construction of public roads and bridges and there are no moneys in the treasury of said county to meet the necessary outlay required for such purposes and a loan of a sufficient sum is required to meet such expenditures, and

Whereas the creation of such an indebtedness for those purposes is deemed necessary by this board and expedient at this time to appreciate the value of the obligation of this county :

It is therefore ordered by this board that the amount of money required for the erection of public buildings is the sum of fifty thousand dollars (\$50,000.00) and for the building and construction of roads and bridges is the sum of five thousand dollars (\$5,000.00).

And it is further ordered that the question of making such loan on the account of the county be and the same is hereby submitted to a vote of the electors of said county qualified to vote on said question at the next general election to be held in said county on the seventh day of October next in accordance with the general laws of Colorado in such case made and provided.

It is further ordered that the clerk of said county be and he is hereby authorized and directed to give and publish the notice of submission to the electors of said county as the law requires and that in pursuance of said order a vote of said electors will be taken by the judges of election at the respective polling places in the several election precincts of said county at the general election to be held on Tuesday, October 7th, A. D. 1879.

107 All persons voting on that question shall vote by separate ballot whereon is placed the words "For county indebtedness" or against county indebtedness and no person shall vote on the question unless he have the necessary qualifications of an elector as provided by law and shall have paid a tax upon property assessed to him in the county for the year immediately preceding said election.

By order of the Board of County Commissioners of Lake County.

JOS. H. WELLS,

County Clerk and ex Officio Clerk of said Board.

To be placed in a conspicuous place in each voting precinct in the county for at least thirty days previous to said election and

Whereas it also appears to this board that in the canvass of the votes cast in said county on said general election day upon the question of making such loan that a majority of the votes cast are for the county indebtedness and that therefore under the constitution and laws of Colorado this board is authorized to contract said debt in the name of the county for said specified purposes.

It is therefore ordered by this board as follows to wit :

First. That the bonds of Lake county to the amount of fifty thousand dollars be made and issued and a loan of money effected thereon to be used for the purpose of necessary public buildings.

Second. That said bonds so to be issued shall be in form and in the words and figures as follows :

No. —.

\$—.

UNITED STATES OF AMERICA, *County of Lake, Colorado.*

Know all men by these presents that the county of Lake in the State of Colorado, acknowledges itself indebted and promises to pay

to ——— or bearer five hundred dollars for value received redeemable at the pleasure of the county after ten years, and absolutely due and payable twenty years from the date hereof at the office of the treasurer of the county of Lake aforesaid in the city of Leadville in said county with interest at the rate of ten per cent. per annum payable annually on the first day of April of each year at the office of the county treasurer aforesaid upon delivery of the coupon hereto attached.

108 This bond is one of a series of like tenor the whole amounting to fifty thousand dollars which the Board of County Commissioners of said Lake County is authorized to issue for the purpose of erecting necessary public buildings pursuant to the provisions of chapter XXII of the General Laws of the State of Colorado being an act entitled "An act concerning counties, county officers and county government and repealing laws on these subjects" approved March 24th A. D. 1877.

In testimony whereof the Board of County Commissioners of said County of Lake has caused the seal of the said county and the signature of its chairman to be hereunto affixed and the same to be attested by the clerk of the county at Leadville, this — day of ——— A. D. 188—.

Chairman Board of County Commissioners.

Attest: _____,
County Clerk.

§—. The County of Lake, in the State of Colorado. §—.

Will pay the bearer — dollars at the office of the treasurer of Lake county on the first day of April, 18—.

Interest on bonds for necessary public buildings.

No. —.

Chairman Board of County Commissioners.

It is further ordered that it be and hereby is made known to whom it may concern by said county of Lake through this the action and order of its board of commissioners duly and legally convened for the purpose of acting upon the business in hand that said county of Lake guarantees that all the provisions of the General Assembly of the State of Colorado entitled "An act concerning counties, county officers and county government and repealing laws on these subjects" approved March 24th A. D. 1887 are, have been, and will be fully complied with in the (issuing) of the bonds hereby ordered to be issued and the full faith credit and property of said county are hereby pledged to the prompt payment of the money secured by said bonds and the interest thereon as it becomes due.

On motion it is ordered that the new bonds substituted for the old ones bear the date of the old ones.

On motion it was ordered that eleven thousand (\$11,000.00) dollars of the said bonds so as aforesaid issued be exchanged with

109 Walter H. Jones for the amount of \$10,750.00 ten thousand seven hundred and fifty dollars of bonds heretofore issued by him he paying L. E. Roberts for the extra or additional amount of two hundred and fifty dollars (\$250.00) in said bonds according to the rate or sum at which said bonds were sold.

It is further ordered that said old bonds amounting to \$10,750.00 ten thousand seven hundred and fifty dollars so exchanged with said Jones be destroyed and cancelled.

On motion it is ordered by the board that thirty-nine thousand dollars (\$39,000.00) of said bonds so as aforesaid be issued to L. E. Roberts, Esq., pursuant of his bid and agreement heretofore accepted and that he receive for the \$250.00 in bonds in excess of said sum of thirty-nine thousand (\$39,000.00) the amount per dollar so bid by him from Walter H. Jones, pursuant to the above order and that the bonds heretofore issued to said Roberts, to wit, bonds amounting to (\$12,000.00) be returned by him to this board on the delivery of said new issue.

It is further ordered that the said old issue of bonds amounting to the said sum of twelve thousand dollars (12,000.00) be cancelled and destroyed.

STATE OF COLORADO, }
County of Lake, } ss :

I, C. H. S. Whipple, county clerk and *ex officio* clerk of the Board of County Commissioners in and for the County and State aforesaid, do hereby certify that the annexed and foregoing order is truly copied from the records of the proceedings of the Board of County Commissioners for said Lake County, now in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said county, at Leadville, this twentieth day of November, A. D. 1893.

C. H. S. WHIPPLE,
County Clerk.

[Seal of Lake County, State of Colorado.]

Indorsed: No. 11. Commissioners' Record, Book No. 2, page No. 353. Sept. 6, '80. Order of Oct. 27, '79, rescinded and substitute enacted. 2758. Dudley vs. Lake Co. Filed Dec. 21, 1893. Robert Bailey, clerk U. S. circuit court.

* * * * *

110 Mr. BRYANT: The only other evidence I offer is a copy of the complaint in this case, for the purpose of showing that the suit was brought by Mr. Albert Grier, as attorney for the plaintiff. Mr. Wright and Mr. Rollins both testified that he was instructed to employ Messrs. Parks and Johnson. It is for the purpose of contradicting that statement, that is all.

Said complaint so offered, will be found in the record.

GEORGE R. ELDER, a witness produced, sworn and examined on behalf of the defendant, testified as follows:

Direct examination.

By W. H. BRYANT, Esq.:

Q. What is your full name, Mr. Elder?

A. George R. Elder.

Q. Where do you reside?

A. Leadville.

Q. How long have you lived in Leadville?

A. Since January, 1879.

Q. What has been your business?

A. Lawyer.

Q. I hand you this book and ask you to state where you got it?

A. I received this from the firm of C. C. Davis & Company, successors of the Leadville Democrat Company.

Q. Were you in Leadville at the time those papers were published?

A. I was in Leadville at the time these papers were published.

Q. Is that the form in which the Leadville Weekly Democrat was published at that time?

A. It was the usual form in which the Leadville Weekly Democrat was published. I was a subscriber to this paper, and the daily.

Q. I will ask you to look at the issue of February 7th, 1880, and state whether that is the usual form of the Weekly Democrat at that time?

A. It is, sir.

Mr. BRYANT: Now we offer the last column of page 8 of that paper, which purports to contain a semi-annual statement of the indebtedness of Lake county, signed by the officers of the county, signed by the chairman of the board of county commissioners, and attested by the clerk.

Plaintiff objected because immaterial and incompetent and not properly authenticated.

The COURT: I think the last objection is good, that it is not properly authenticated.

111 Mr. PARKS: Then it is immaterial and incompetent.

Mr. BRYANT: We offer to prove by a copy of the Leadville Weekly Democrat that there was published in the issue of February 7, 1880, a column article headed "Semi-annual statement of Lake county," which stated that it was the outstanding indebtedness of Lake county to Jan'y 1st, 1880; and that is signed by Joseph Pierce, chairman of the board, and attested by Joseph H. Wells, clerk of the board.

The COURT: You have not made any proof of that paper yet.

Q. Do you know anything about this being the files of the Leadville Democrat?

A. I went to the office of the Herald-Democrat, and asked them for their files for 1880, and they presented me with that volume. I did not know of its existence until within the last 10 days.

(Mr. PARKS:)

Q. Is it not a fact that the Herald was published at the same time?

A. It was, and has since been consolidated with the Democrat.

(Mr. PARKS:)

Q. And the Herald itself was independent of the Democrat, and the Democrat separate and distinct from the Herald?

A. Yes, sir.

(Mr. PARKS:)

Q. So that that is not the present Herald-Democrat, but the old paper published by the Herald-Democrat Publishing Company?

A. (No answer)

(Mr. BRYANT:)

(—.) You have got the files of the Herald too?

A. I have the files of the Leadville Weekly Chronicle.

The COURT: I think you ought to prove this by somebody connected with the newspaper office.

To which ruling of the court the defendant by counsel then and there duly excepted, and exceptions allowed by the court.

Said newspaper article so offered and refused is in words and figures following:

EXHIBIT 28.

Mr. BRYANT: I will offer a certificate or statement of publication by C. C. Davis, proprietor of the Weekly Chronicle. I offer that together with an order of the board ordering the bill paid. 112 And here is an entry of the proceedings of the board in which they order it printed, and here is one ordering the bill for printing to be paid, and here is the certificate signed by Mr. Davis that it was published.

The COURT: I think I will admit the proof.

Mr. PARKS: We object to it because immaterial, incompetent, and not properly authenticated. There is no evidence here accompanying it or in this case showing that the board of county commissioners ever made this semi-annual statement officially or otherwise, or signed and executed it and had it recorded in the office of the county clerk of Lake county, who is *ex officio* clerk of the board, as the law requires. The only authentication of it, if at all, is that it simply purports to be the semi-annual statement of January 1st, 1880, some six months before these bonds were issued. It is a statement purporting only to be signed by somebody and copied out of some paper; the warrants might have all been paid by that time. There is no evidence showing and proving that the supposed original of the supposed copy statement was ever entered of record by the clerk of the defendant Board of County Commissioners in a book kept by him for that purpose only, as required by sec. 457 of the

General Laws of Colorado, 1879, in force at that time. It appears by the evidence of the witness, Newell, that no such book or record was kept at the time, and no such record then made is in the office of the clerk and recorder of said defendant county, who is *ex officio* clerk of said defendant board. The said supposed copy of said supposed original statement does not show on its face what payments, if any, had been made upon the supposed debts therein enumerated, nor the rate of interest borne by the supposed debts, nor of what the debt consisted, nor a detailed account of the receipts and expenditures of the defendant county; nor does it show from what officer or on what account moneys had been received; nor the amounts and to what individuals or on what accounts such moneys had been paid, and the amounts; nor does it show the amount of deficit or the balance in the treasury. Nor does said supposed statement purport to give a detailed account of the receipts and expenditures of said defendant county for the preceding months, nor state the time when the receipts and expenditures dealt with were had and made; and, generally, that said supposed statement is not such an one as is required and contemplated by sec. 457 of the General Laws of 1879 of Colorado, in force at the time such supposed statement is supposed to have been made and published. The proof of publication of the supposed copy of the supposed original statement is insufficient and inadmissible for the reason that it is not the proof made, if any was ever made, at the time

113 of the supposed publication of the original statement. There is no evidence that proof of publication was made at the time of and upon the supposed original. If it was, such proof would necessarily bear date as of the time of publication, whereas the proof of publication attached to the supposed copy was made Dec. 16th, A. D. 1893, more than thirteen years after the date of such statement and its alleged publication. The affidavit of said C. C. Davis attached to said supposed statement is therefore incompetent and cannot be received to prove such publication. The said supposed copy of said supposed original statement shows on its face that it is not and cannot be a true copy of the supposed original, for the reason that the original proof of publication annexed to the original would of necessity bear date as of the date, or near the date, of the publication of the original; that the original itself would be inadmissible as evidence without proof of publication attached thereto, and such original may not be evidenced by copy unless in due time and form made, published and filed, with proof of publication attached, with the clerk of the defendant Board of County Commissioners, and by him recorded in a book by him kept for that purpose, as required by said section of said law. Without competent proof of publication the said supposed copy statement, or its supposed original, cannot be admitted as evidence of the supposed facts which they contain. There is no proof whatever of the existence of the supposed original of the supposed copy statement, neither of its existence or that it was made and executed by any or either of the officers who purport to have executed the same. For aught that appears in evidence the supposed original was never made or executed by any authority

whatever. The orders of the board are also signally incompetent and prove nothing conclusively regarding the statement offered.

The COURT: He offers it in connection with the certified copy of the orders of the county commissioners. This paper alone would not be admissible, as I understand it, but he offers it in connection with the order of the board ordering it published in this newspaper, and ordering its payment.

Objection overruled. To which ruling of the court the plaintiff by counsel then and there duly excepted, and exceptions were allowed by the court.

114 The various exhibits referred to in the foregoing offer are in words and figures following, to wit:

EXHIBIT 29.

Semi-annual Financial Statement of Lake County.

Showing the outstanding indebtedness of Lake county on January 1, A. D. 1880, as appears by the records in the office of the clerk of said county, as required by law.

Expenditure Account, General Fund.

	Dr.	Cr.
County clerk's fees.....	\$1,150.00	
County assessor's fees.....	2,467.93	
County attorney's fees.....	1,390.28	
Sheriff's fees.....	9,906.77	
County physician's fees.....	720.67	
County school sup't.....	75.00	
County commissioners' fees.....	2,572.78	
County surveyor's fees.....	347.00	
County coroner's court fees.....	1,322.75	
Justice's fees.....	3,378.75	
Constable's fees.....	1,171.35	
Justice court fees.....	1,092.85	
District court fees.....	8,686.30	
County court fees.....	503.44	
County jail expenses.....	15,913.01	
Expense of county prisoners.....	1,768.70	
County poor expenses.....	11,709.17	
Purchase of court-house.....	10,552.00	
Books and stat'y for Co. offices.....	5,811.86	
County printing.....	863.70	
Furniture and repair Co. offices.....	5,697.16	
Transcript of records.....	6,349.05	
County gauger's expenses.....	379.32	
Auditing accs. between Lake and Chaffee counties.....	975.00	
Election expenses.....	1,036.80	
Commissioners' expenses.....	50.00	
Interest paid on warrants.....	182.61	
Total expenditures.....	\$96,074.24	

By amount of warrants cancelled	11,777.96
By outstanding indebtedness of Lake county in county warrants January 1, A. D. 1880, to balance	84,296.28
Total	<u>\$96,074.24</u>

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Expenditure Account, Road Fund.

Total expenditure on county roads, in repair- ing, making and bridging	\$3,101.84
Interest paid on warrants	69.28
Total expenditures	<u>\$3,171.12</u>
By amount of road warrants cancelled	\$2,320.59
Outstanding indebtedness of Lake county in road warrants January 1, A. D. 1880 to balance	851.59
	<u>\$3,172.12</u>

Statement

Showing the account of the several funds, as per semi-annual state-
ment had with the county treasurer, January 1, A. D. 1880.

County Fund.

Tax levy A. D. 1879	\$34,856.28
Additional assessments	32.20
Cash, keeping U. S. prisoners	27.00
	<u>\$34,915.48</u>
County warrants cancelled	\$8,302.96
Delinquent tax	25,991.96
Cash in treasury to balance	620.56
	<u>\$34,915.48</u>

State Fund.

Tax levy A. D. 1879	\$13,942.04
Additional assessments	12.90
	<u>\$13,954.94</u>
Account delinquent tax	\$10,394.25
Cash in treasury to balance	3,560.69
	<u>\$13,954.94</u>

General School Fund.

Amount paid in by State auditor	\$92.35
Fines from Justice Stansell's court	215.00
Fines from Justice Ballou	95.00
Tax levy A. D. 1879	10,456.51
Additional assessments	9.65
	<u>\$10,868.51</u>

116	By district treasurer's (couchers) cancelled.....	\$265.35
	By delinquent tax.....	7,795.60
	By cash in treasury to balance.....	2,807.56
		<hr/>
		\$10,868.51

Special School Fund, District No. 2.

	Tax levy A. D. 1879.....	\$31,127.32
	Additional assessments.....	32.20
		<hr/>
		\$31,159.52
	By delinquent tax.....	\$23,818.73
	By cash to balance in treasury.....	7,340.79
		<hr/>
		\$31,159.52

Road Fund.

	Tax levy A. D. 1879.....	\$17,430.61
	Additional assessments.....	16.11
		<hr/>
		\$17,466.72
	By road warrants cancelled.....	\$2,320.59
	By delinquent tax.....	12,993.75
	By cash in treasury to balance.....	2,132.38
		<hr/>
		\$17,446.72

Contingent Fund.

	Tax levy A. D. 1879.....	\$2,933.00
	Additional assessments.....	6.00
	Cash for county building.....	1,049.00
		<hr/>
		\$3,988.00
	By delinquent tax.....	\$2,822.00
	By cash in treasury to balance.....	1,166.00
		<hr/>
		\$3,988.00

Mute and Blind Fund.

	Tax levy A. D. 1879.....	\$696.74
	Additional assessment.....	.64
		<hr/>
		\$697.38
	By delinquent tax.....	\$519.33
	By cash in treasury to balance.....	178.06
		<hr/>
		\$697.38

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University Fund.

Tax levy A. D. 1879.....	\$696.74	
Additional assessment.....	.64	
	<hr/>	
	\$697.38	
By delinquent tax.....		\$519.33
By cash in treasury to balance.....		178.05
		<hr/>
		\$697.38

School of Mines Fund.

Tax levy A. D. 1879.....	\$696.74	
Additional assessment.....	.64	
	<hr/>	
	\$697.38	
By delinquent tax.....		\$519.33
By cash in treasury.....		178.05
		<hr/>
		\$697.38

Agricultural Fund.

Tax levy A. D. 1879.....	\$696.74	
Additional assessment.....	.64	
	<hr/>	
	\$697.38	
By delinquent tax.....		\$519.33
By cash in treasury..		178.05
		<hr/>
		\$697.38

Insane Fund.

Tax levy A. D. 1879.....	\$696.74	
Additional assessment.....	.65	
	<hr/>	
	\$697.39	
By delinquent tax.....		\$519.33
By cash in treasury to balance.....		178.06
		<hr/>
		\$697.39

Military Roll Fund.

Tax levy A. D. 1879.....	\$1,466.50	
Additional assessment.....	3.00	
	<hr/>	
	\$1,469.50	
By delinquent tax.....		\$1,411.50
By cash in treasury to balance.....		58.00
		<hr/>
		\$1,469.50

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Interest on Bonds Fund.

Tax levy A. D. 1879.....	\$1,059.46	
Additional assessment.....	1.00	
	<hr/>	
	\$1,060.46	
By delinquent tax.....		\$782.29
By cash in treasury to balance.....		277.17
		<hr/>
		\$1,060.46

City of Leadville Tax.

Tax levy A. D. 1879.....	\$47,751.44	
Additional assessment.....	64.40	
	<hr/>	
	\$47,815.84	
By delinquent tax.....		\$36,155.80
By cash in treasury to balance.....		11,660.04
		<hr/>
		\$47,815.84

County License Fund.

To amount paid in for license.....	\$3,475.00	
	<hr/>	
	\$3,475.00	
By amount in county warrants cancelled....		\$3,475.00

City of Malta Fund.

To am't tax levy A. D. 1879... ..	\$2,512.12	
	<hr/>	
	\$2,512.12	
By delinquent tax.....		\$2,288.47
By cash in treasury to balance.....		223.65
		<hr/>
		\$2,512.12

STATE OF COLORADO, }
 Lake County, } ss:

It is hereby certified that the above and foregoing is a true and correct statement of the financial condition of said county showing the amount of indebtedness of said county, outstanding in county and road warrants January 1, A. D. 1880, that the same is also a true and correct statement of the condition and standing of the different funds as shown by a settlement had with the county treasurer by the board of county commissioners January 1, 1880, as appears from the report and accounts of said treasurer received on said date.

By order of the board of county commissioners of said county.
 JOSEPH PEARCE, *Chairman.*

Attest: JOSEPH H. WELLS.
Clerk of the Board.

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Proof of Publication.

STATE OF COLORADO, }
County of Lake, } ss.:

C. C. Davis being first duly sworn, deposes and says that he is the proprietor of the Carbonate Chronicle, a weekly newspaper published at Leadville in Lake county in the State of Colorado; that the notice of the semi-annual financial statement of Lake county, Colorado, showing the outstanding indebtedness of Lake county, Colorado, on January first, A. D. 1880, of which a copy is hereto attached was published in said newspaper, in its issue dated the seventh day of February, A. D. 1880.

C. C. DAVIS.

Subscribed and sworn to before me this sixteenth day of December, A. D. 1893.

[SEAL.]

MILLARD C. YOTHERS,
Notary Public.

My commission expires March 21, 1897.

EXHIBIT 30.

STATE OF COLORADO, }
County of Lake, } ss.:

At a regular meeting of the Board of County Commissioners for Lake County, Colorado, held at the court-house, in the city of Leadville, on the 26th day of January, A. D. 1880, there were present:

Joseph Pearce, chairman,

G. M. Gerrish, commissioner,

Jos. H. Wells, clerk,

By E. T. Wolverton, deputy,

when the following proceedings, among others, were had and done, to wit:

On motion it is ordered that the semi-annual statement of the financial affairs of the county as required by section No. 447 of the General Laws of Colorado be made by the clerk of this board, and when so made, approved by this board, signed by the chairman, and attested by the county clerk, that the same be published in the Carbonate Weekly Chronicle, and the Leadville Weekly Democrat, two weekly newspapers published in said county of Lake.

STATE OF COLORADO, }
County of Lake, } ss.:

I, C. H. S. Whipple, county clerk and *ex officio* clerk of the Board of County Commissioners in and for the County and
 120 State aforesaid, do hereby certify that the annexed and foregoing order is truly copied from the records of the proceedings of the Board of County Commissioners for said Lake County, now in my office.

Seal of Lake County, In witness whereof, I have hereunto set
State of Colorado, my hand and affixed the seal of said county,
at Leadville, this 16th day of Dec. A. D. 1893.

C. H. S. WHIPPLE,

County Clerk.

Indorsed: 2758. U. S. circuit court. Certified copy of order—
H. H. Dudley vs. Lake Co.—made by the Board of County Com-
missioners of Lake County, Colorado, — 188—. Order of board
to clerk to publish semi-annual statement. Filed Jan. 11, 1894.
Robert Bailey, clerk U. S. circuit court.

EXHIBIT 30.

STATE OF COLORADO, }
County of Lake, } ss :

At a regular meeting of the Board of County Commissioners for
Lake County, Colorado, held at the court-house, in the city of Lead-
ville, on the 10th day of Dec. A. D. 1880, there were present:

Joseph Pearce, chairman,

G. M. Gerrish, commissioner,

Jos. H. Wells, county clerk,

By E. T. Wolverton, deputy,

when the following proceedings, among others, were had and done,
to wit:

On motion is is ordered that the following-named persons be
allowed the amounts set opposite their names and warrants ordered
drawn in the county fund for the same.

Leadville, Democrat prt. ann. statement, \$20.00.

STATE OF COLORADO, }
County of Lake, } ss :

I, C. H. S. Whipple, county clerk and *ex officio* clerk of the Board
of County Commissioners in and for the County and State aforesaid,
do hereby certify that the annexed and foregoing order is
121 truly copied from the records of the proceedings of the Board
of County Commissioners for said Lake County, now in my
office.

In witness whereof I have hereunto set my
Seal of Lake County, hand and affixed the seal of said county at
State of Colorado. Leadville, this 16th day of Dec., A. D. 1893.

C. H. S. WHIPPLE,

County Clerk.

Indorsed: 2758. U. S. circuit court. Certified copy of order,
H. H. Dudley vs. Lake County, made by the Board of County Com-
missioners of Lake County, Colorado, — —, 188—. Order allow-
ing bill for publication of semi-annual statement. Filed Jan. 11,
1894. Robert Bailey, clerk U. S. circuit court.

Mr. BRYANT: Now, I would like to intraduce a certified copy of
the bond register, showing that these bonds were issued on the 30th

of December, 1879, and were afterwards reissued, but the identical bonds which were originally issued were afterwards reissued in 1880; so that the indebtedness was actually contracted on the 31st of December, 1880.

Plaintiff objected because immaterial, incompetent, irrelevant as regards the proceedings of the board.

The COURT: When was the election held?

Mr. PARKS: October 7, 1879.

Objection overruled. To which ruling of the court the plaintiff by counsel then and there duly excepted, and exceptions were allowed by the court.

The COURT: Were these bonds issued and delivered, or subsequently called in? If that is so you may offer your register.

Mr. BRYANT: Some of the bonds issued on the 31st of December, 1879, are actually outstanding at the present time; and there is something peculiar about the bonds, because the records here show that some of them were canceled and not issued until along in September, 1880, although they all bear the same date. Those are the ones that are sued on in this case, the first \$11,000 worth still bear the date of December 31, 1879, and they are all of one issue, authorized by one vote of the people.

The COURT: Do you say \$11,000 of the bonds are now outstanding?

Mr. BRYANT: Yes, sir, that is my understanding of it.

122 The COURT: What does the record show about it, Mr. Bryant?

Mr. BRYANT: Yes, sir, it shows that the bonds 67—which are the ones in suit in this case—some of them, at least, from 67 up to 129, all of which are in suit in this case, are still outstanding. No, that they are dated in 1880; that is right; those that were reissued at that time were reissued July 31st, and according to this it seems to be July 31, 1879. I think it means July 31, 1880. Here are the ones that I had reference to, bonds 55 to 66, dated December 31, 1879, for \$1,000, are still outstanding: 10 of them for \$1,000 and 2 for \$500 are still outstanding.

The COURT: They are not the bonds in this case?

Mr. BRYANT: They are the bonds of Walter H. Jones, of whose estate I believe Mrs. Jones is executrix, that is to say, these were issued to Mr. Jones. That \$11,000 worth of bonds bears date Dec. 31, 1879, and are some of the bonds included here.

The COURT: You may offer that, then.

Mr. BRYANT: Here is the original bond register which shows that.

The COURT: A certified copy will do.

To which ruling of the court the plaintiff by counsel then and there duly excepted and exceptions were allowed by the court.

Said exhibits so received in evidence is in words and figures following:

* * * * *

And thereupon the plaintiff to further maintain the issues on his behalf, gave in rebuttal as follows:

DANIEL E. PARKS, recalled on behalf of the plaintiff, testified as follows:

Direct examination.

By H. B. JOHNSON, Esq.:

Q. You may state briefly what knowledge you have of the public indebtedness of Lake county in 1879 and 1880?

Mr. BRYANT: We object to Mr. Parks stating it briefly or at length, because it is not the best evidence of what the public indebtedness was. His knowledge of what it was would not be evidence.

123 Objection overruled. To which ruling of the court the defendant by counsel then and there duly excepted, and exceptions were allowed by the court.

A. Yes, sir, I know something about the indebtedness of Lake county; I know a great deal of it. I was attorney for the county from the 11th day of Feb. 1879, when the county was organized, until the 15th day of April, 1880, when I resigned. I was reappointed on the 23rd day of April, 1883, and served until the 1st of January, 1890.

Q. On page 2 of this county clerk's account book, the indebtedness of the county is summed up on July 1st, 1880, as \$198,394.57, purporting to be an outstanding indebtedness of Lake county in county warrants.

A. What is the date of that?

Q. July 1, 1880. You may state if you know what proportion of those warrants have been adjudicated to be void and not binding upon the county.

Defendant objected because immaterial. Objection sustained. To which ruling of the court the plaintiff by counsel then and there duly excepted, and exceptions were allowed by the court.

A. I can state generally—

The COURT: I sustained the objection to that question. You cannot prove that question in that way.

Q. You may state whether or not you took an account of these warrants, comparing each one with the public indebtedness outstanding at the date of each warrant, to ascertain which of these warrants were issued within and which without the constitutional limitation.

A. Yes, sir. That assumes that I took that account manually; I did not do it. I will tell you how it was done.

Mr. BRYANT: If he did not take it we will object.

WITNESS: It was done under my supervision.

Mr. BRYANT: He has answered that question, and I do not think there is anything before the court now.

The COURT: He has modified his answer by saying that it was done under his supervision.

Q. You may state whether or not any, and, if so, what portion of these warrants went into the funding bonds that were issued in 1881.

Mr. BRYANT: I object, because it is a matter of record, which can be proved by the records of the county.

124 Objection sustained. To which ruling of the court the plaintiff by counsel then and there duly excepted, and exceptions were allowed by the court.

Mr. BRYANT: They have a lot of suits now, going back of these warrants and picking each out, which are good or not.

A. Yes, sir, they are proving them—

Q. Yes, you may state whether any of these warrants were sued upon in the case of Rollins against Lake County.

A. In the case of Frank W. Rollins against the Board of County Commissioners of Lake County, in this court?

Mr. BRYANT: I object to their proving any matter in litigation except by the records of the court.

A. The records of the court will show that.

Objection sustained. To which ruling of the court the plaintiff by counsel then and there duly excepted, and exceptions were duly allowed by the court.

Mr. JOHNSON: I offer to prove by the witness that these warrants that constitute the entire outstanding indebtedness, according to this book, of Lake county, on July 1, 1880, either went into the issue of \$500,000 of funding bonds, that were issued by Lake county in 1882, or were involved in the case of Rollins against Lake County, in both of which cases the warrants were held illegal and void by the Supreme Court of the United States, and the county released from the payment of that indebtedness. Now, to support that offer I suggest to the court that the public records would not show the date of these warrants; when they were funded they were canceled or destroyed. That funding was the funding of the entire outstanding warrant indebtedness of the county, as it had to be under the law, and when these warrants were given up and bonds given in their place, they were canceled and destroyed, and it is impossible to follow each particular warrant that went into those funding bonds. There was \$500,000 of these warrants funded.

The COURT: It would be a dangerous proceeding to admit proof of those matters in the way you undertake to do it. I am satisfied now, under the decision of the appellate court, while I thought otherwise at the former trial, and I still think that the other record is the proper record, but I believe, under this decision, that you are bound to take notice of that record and what it showed, if it showed outstanding indebtedness in excess of the sum set by the constitu-

125 tion, you are bound to take notice of it. I ruled before that you are not bound to take notice of this record, but this case compels me to rule otherwise, very much against my personal views.

Mr. JOHNSON: I suppose your honor will take notice that this whole amount may be illegal.

The COURT: Yes, sir. I think you are bound by that record. That is my view of it. If that record shows the outstanding indebtedness, and the contest when we were here before was whether or not you were obliged to take notice of this record, it not being a record kept as required by law, and to go into the question of the validity of all these claims, I do not propose to do it in this litigation. If you can prevail upon the court of appeals to sustain my former ruling, which I thought then was right, and which it seems to me would be proper yet, but as they seem to differ with me, I of course submit to their views about it.

Mr. JOHNSON: Then that we may get the benefit of the ruling of the court, I desire to prove by the records of the decisions in the Lake County case against Rollins and Lake County *vs.* Graham, and by other record evidence of this and other courts, and by the records of Lake county, that the indebtedness summed up as outstanding indebtedness of Lake county, in county warrants, July 1st, 1880, on page 2 of the book entitled "County Clerk's Account Book," a transcript from which has been admitted in evidence has all been adjudicated and held to be void by the courts, and that as a matter of fact, it was illegal and void at the time it was issued.

Mr. BRYANT: We object to it upon the ground that he has not got the records here to prove any such thing, and that there is no record evidence shown to the court that would tend to support any such proposition, and that it is immaterial, irrelevant and incompetent, and not the proper way of proving the invalidity of this debt.

Objection sustained. To which ruling of the court the plaintiff by counsel then and there duly excepted, and exceptions were allowed by the court.

If the gentleman insists on putting the objection on the ground that it is not here, we desire to obtain the records. Many of the records are in this court. I think the court had indicated that it would exclude them if we got them, but I do not think it is fair to urge that they are not here.

Mr. BRYANT: I have no objection to your putting in a certified copy of the records in the case of Lake County *vs.* Graham and Lake County *vs.* Rollins.

126 The COURT: No, we will not do that; supply your records.

Mr. BRYANT: I have no objection, except upon the ground that if the records should show that this bond issue was void, but when they said that it shows all of them—it does not show all of them. I will admit that \$40,000 worth of them were void.

Mr. PARKS: Inasmuch as the gentleman on the other side is speaking of a record, if the court will permit me to go to my office I will return with a copy of an order that the board of county commissioners made on the 18th day of October, 1886, in which the

board under my direction—there was an account taken and it points out the legal indebtedness, and whether it is to be paid and whether the balance was to be disregarded; identifies the only legal debts of the county outstanding prior to the passage of the order.

The COURT: No, sir; we will not do that.

Mr. PARKS: We make that offer, then, and offer to prove that.

The COURT: You cannot make the offer. You have not your record here and could not offer it. You may bring the record in here, and it will be excluded, and you may have an exception, if you want it. Give your statement for what it will show.

Mr. JOHNSON: As Mr. Parks has now procured the order he referred to, we will offer this copy of the order of the board of county commissioners of Lake county.

Mr. BRYANT: We object. In the first place, it is not certified to, and it shows that it is a copy of a certified copy.

Mr. PARKS: I will go on the stand and testify that I drew and prepared the original order and had it passed by the board, and that this is a copy of the original.

Mr. BRYAN: You made it from a certified copy, did you? Then we will also object to it on the ground that it is immaterial, irrelevant, and incompetent, because it was made in 1886, six years after these bonds were issued, and because it purports to be a statement on the part of the board of county commissioners, as I understand it, that certain indebtedness was legal and certain indebtedness was illegal, and they are not the proper tribunal to decide any such question as that.

The COURT: The first ground of the objection, that it is a copy, is not well taken, although on the last ground I will sustain the objection, that it is incompetent.

127 Mr. PARKS: Well, then, I will show that it is competent.

The court is not advised of what the order is.

The COURT: I am advised of what you said it was, that it was a statement by the board of county commissioners on the validity of its indebtedness.

Mr. PARKS: It is an order of the board of county commissioners, made on the 18th day of October, 1886, as the result of taking an account of the outstanding indebtedness, in which they recognized and ordered to be paid, the legal portion of the debt outstanding, including this indebtedness, and directing the treasurer not to pay the invalid part. This record shows the indebtedness as they ascertained it, to amount to \$24,815.90; by including the valid warrant indebtedness they by necessary implication exclude the payment of all other indebtedness, much of which is included by this evidence offered here by defendant in the form of warrant registry, clerk's account, etc.

The COURT: The objection is sustained. Let it be filed as an exhibit in the case.

To which ruling of the court the plaintiff by his counsel then and there duly excepted, and exceptions were allowed by the court.

Said exhibit so excluded is in words and figures following:

* * * * *

Mr. BRYANT: In regard to the other offer made by Gen. Johnson, I am willing that the record may show that the Supreme Court of the United States declared that a certain bond issue of \$500,000 in 1882 was illegal and void, and that they also held that some \$40,000 of these warrants issued some time prior to 1882 were also illegal.

Mr. PARKS: Will you include in your admission that part of the bonds referred to, covered \$500,000 of the warrant indebtedness of the county, a large portion of which is the same as that covered by these exhibits that you have before you in evidence?

Mr. BRYANT: I do not think so. The county had a right to issue a certain amount. I will not admit it, because I do not think it is true.

Mr. PARKS: Then we offer to prove that.

Mr. BRYANT: I do not want the record to show that they were permitted to come here and offer to prove from these records certain things, which the records themselves do not contain.

128 The COURT: You do not make any further offer as to this last matter suggested, do you?

Mr. JOHNSON: I think we might offer—I think enough appears by the opinions, the two decisions of the court. I offer the opinions of the Supreme Court in the Graham and Rollins cases.

Mr. BRYANT: We have no objection to them. That is, I do not know, if your honor please, whether those opinions show the amount of the bonds that were sued upon. They show the amount of the bonded indebtedness. We will not make any objection to the opinions, because they have not any certified copy here, but I will object to them on the ground that they are immaterial, incompetent and irrelevant in this suit, as tending to show that a part of this indebtedness was illegal—

The COURT: The objection is sustained on that ground. I thought you said you admitted it without objection.

Mr. BRYANT: I do not think we care to admit it. I do not think the opinion shows the amount of the warrants. It shows the amount of the bonds. In the case of Lake County against Rollins it simply states that it was a suit against the county of Lake, was based on a large amount of warrants issued for the ordinary county expenses, and does not give the amount of them anywhere. In Lake County vs. Graham it was a suit for \$7,280 worth of coupons. If you want to offer that, I will simply make the general objection that it is immaterial, incompetent and irrelevant.

The COURT: I will sustain it if you make your objection on that ground. I do not think it has anything to do with this case.

Mr. JOHNSON: Then we will offer the pleadings in this case to show what was involved in those cases.

The COURT: Go ahead and bring them in and offer them. I do not propose to go into this because there was no offering of fact. It is a matter about which counsel ought not to have any trouble.

Mr. BRYANT: I am willing to admit that the amount of warrants issued was about \$40,000, for the purpose of saving time.

The COURT: Does that do away with the necessity of offering those—

Mr. JOHNSON: I think it would.

129 Mr. BRYANT: I am willing to admit that the United States Supreme Court declared that \$40,000 of the warrants issued by Lake county prior to 1882 were illegal and void, and if that is material and relevant, why you are entitled to that evidence.

Mr. JOHNSON: The record will show that they were these warrants issued in 1879 and 1880 altogether.

Mr. BRYANT: I will admit that the record shows those facts, but that it is not material evidence.

Mr. JOHNSON: Do you admit that these warrants are for some indebtedness prior to July 1st, 1880?

Mr. BRYANT: I do not know that the records will show that. It was indebtedness prior to bringing that suit, whatever it was. This was filed in 1887.

Mr. JOHNSON: It gives the record there.

Mr. BRYANT: There is \$70 of the warrants here, in 1880—prior to 1881. I will admit those, and the balance of them were—I will admit that \$70 of this indebtedness is illegal. It shows there; there is a list of them.

The COURT: These warrants as shown there are September, 1881.

Mr. BRYANT: There are \$70 before 1881, and the balance are all after 1881. I say that we will admit that there was \$70 worth of the indebtedness sued upon in the Rollins case against Lake county, which was included within the warrants set out in this warrant register, but we object to all of it as immaterial, incompetent and irregular.

Mr. JOHNSON: I suppose you will admit that all these warrants went into those funding bonds.

Mr. BRYANT: I do not know as to that. A lot of these are paid. They were the outstanding indebtedness at the time these bonds were issued, and were then afterwards paid, and of course cease to be an indebtedness. I do not know how many of them went into the funding bonds.

Mr. PARKS: It shows it was indebtedness existing prior to Jan'y 1, 1880.

The COURT: These warrants in that suit, they were subsequent?

Mr. PARKS: Subsequent to the 1st of Jan'y, 1880.

130 The COURT: As to that offer I will sustain the objection, because it is not shown they were outstanding at the time these bonds were issued. Now, does that complete the record, gentlemen, as you want to make it?

Mr. JOHNSON: I think it does. I do not think of anything else we have at hand to introduce.

Plaintiff rests.

And thereupon the defendant by counsel requested the court to instruct the jury to return a verdict for the defendant. And thereupon plaintiff by counsel, requested the court to instruct the jury to return a verdict for the plaintiff. The court refused to so instruct

the jury to find for the plaintiff, and to which refusal of the court the plaintiff by counsel then and there and at the time duly excepted, and exceptions were allowed by the court.

The foregoing was all of the evidence offered and all the evidence adduced in this cause.

And thereupon the plaintiff requested the court to charge the jury as follows:

"The jury are instructed that the amendment to article eleven, section six, of the constitution of the State of Colorado, adopted November 6, 1888, operates to validate the bonds and coupons the validity of which is involved in this action, even though they may have been originally issued in excess of the valuation prescribed by the constitution or the statutes of Colorado."

The court refused to give said instruction to the jury; and to the refusal of the court to charge the jury as requested, the plaintiff by counsel then and there duly excepted, and exceptions were allowed by the court.

And thereupon the plaintiff requested the court further to charge the jury as follows:

"The court instructs the jury that the plaintiff in this cause, Harry H. Dudley, being a non-resident of the State of Colorado, and a citizen of the State of New Hampshire, as appears by the evidence in this case, had the legal right to purchase the bonds and coupons in question for the purpose of enforcing the same by this action, and such purchase as shown by the evidence in this case is lawful and valid and operated to transfer the legal title of said bonds and coupons to him."

The court refused to give said instruction to the jury; and to the refusal of the court to charge the jury as requested, the plaintiff by counsel then and there duly excepted, and exceptions were allowed by the court.

And thereupon the plaintiff by counsel requested the court to charge the jury as follows:

"The court instructs the jury that the sale of the bonds and coupons in question involved in this suit, to Mr. Edward W. Rollins, about the time the bonds were issued, as testified to by him and undisputed in this case, for a valuable consideration, made him a *bona fide* purchaser thereof for value and without notice of any claimed defect or invalidity of said bonds and coupons, and the *bona fides* of such purchase by him for value without notice, characterizes the said bonds and coupons so purchased and renders all subsequent purchasers thereof *bona fide* purchasers."

The court refused to give said instruction to the jury; and to the refusal of the court to charge the jury as (requestion), the plaintiff, by counsel, then and there and at the time, duly excepted, and exceptions were allowed by the court.

And thereupon the plaintiff by counsel requested the court further to charge the jury as follows:

"The jury are instructed that in determining whether the constitutional or statutory limitation was exceeded by the issuance of said bonds, they will take into consideration the assessed valuation

of 1880, in force at the time the bonds were issued, and not that of 1879, in force at the time of the vote of the people."

The court refused to give said instruction to the jury; and to the refusal of the court to charge the jury as requested, the plaintiff by counsel, then and there and at the time duly excepted, and exceptions were allowed by the court.

And thereupon the plaintiff requested the court further to charge the jury as follows:

"The jury are instructed that the validity of an obligation issued by a county, in so far as it is affected by the limitation of indebtedness, depends upon the state of the valid indebtedness outstanding at the time the obligation is issued, and if the jury believe from the evidence that the valid and outstanding indebtedness of defendant at the time of the issuance of the bonds in question, and including said bonds, did not exceed the limit prescribed by the constitution or the statute, then they will find a verdict for the plaintiff."

The court refused to give said instruction to the jury; and to the refusal of the court to charge the jury as requested, the plaintiff by counsel, then and there and at the time, duly excepted, and exceptions were allowed by the court.

And thereupon the plaintiff by counsel requested the court further to charge the jury as follows:

"The jury are instructed that the burden of proof to show that the valid outstanding indebtedness of defendant, at the time the bonds were issued, was such that, by the issuance of the bonds, the limitation of indebtedness prescribed by the constitution or the statutes of Colorado was exceeded, rests upon defendant."

The court refused to give said instruction to the jury; and to the refusal of the court to charge the jury as requested, the plaintiff by counsel, then and there and at the time, duly excepted, and exceptions were allowed by the court.

And thereupon the plaintiff by counsel requested the court further to charge the jury as follows:

"The jury are instructed that under the constitution as it stood at the time the bonds in question were issued, the people of a county having an assessed valuation of more than five millions, could authorize the contraction of a debt amounting to six dollars on each one thousand dollars of valuation, and that the validity of the debt thus contracted could not be affected by any outstanding indebtedness of such county."

The court refused to give said instruction to the jury; and to the refusal of the court to charge the jury as requested, the plaintiff by counsel, then and there and at the time, duly excepted, and exceptions were allowed by the court.

And thereupon the court instructed the jury to return a verdict for defendant, which was accordingly done, in the words and figures following, to wit:

"In the Circuit Court of the United States for the District of Colorado.

HARRY H. DUDLEY

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE.

We, the jury in the above-entitled cause, find the issues herein joined for the defendant.

(Signed)

C. H. McLAUGHLIN, *Foreman.*"

To which ruling of the court and the rendition of said verdict, the plaintiff by counsel, then and there and at the time, before the jury had left the box, duly excepted, and exceptions were allowed by the court.

133 And thereupon the plaintiff, by counsel, gave notice of a motion for a new trial.

And judgment was thereupon entered in favor of the defendant upon said verdict. To which judgment and the giving, rendition and entry thereof, by the court, the said plaintiff then and there, in due time, form and manner, duly excepted.

And thereafter and on the 8th day of January, A. D. 1896, the plaintiff filed in said court its motion for a new trial of said cause, which said motion is in words and figures following, omitting the caption :

"And now comes the plaintiff in the above-entitled action by H. B. Johnson and Daniel E. Parks, his attorneys and moves the court to set aside the verdict of the jury rendered upon the trial of the above-entitled cause, and the judgment entered thereon in favor of the defendant in said cause, and grant a new trial therein, to the said plaintiff, upon the merits of said cause, upon the following grounds :

First. The court erred in admitting improper evidence on the trial of said cause in favor of the defendant and against the objections of the plaintiff.

Second. The court erred in refusing to receive and admit proper evidence offered by the plaintiff on the trial of said cause, objected to by the defendant and offered and insisted upon by the plaintiff.

Third. The court erred in instructing the jury to render a verdict in said cause on the trial thereof in favor of the defendant and against the plaintiff.

Fourth. The court erred in receiving and admitting on the trial of said cause all and each part of the evidence offered by the defendant to show the outstanding indebtedness of the defendant county on the 31st day of December, 1880, when the bonds in suit were shown to have been made and issued.

Fifth. The court erred in refusing to receive and admit evidence offered by the plaintiff showing the outstanding indebtedness of the county at the time of the issuance of the bonds.

Sixth. The court erred in rendering judgment upon said verdict of said jury in favor of the defendant and against the plaintiff.

Dated this 8th day of January, A. D. 1896.

H. B. JOHNSON,
DAN'L E. PARKS,
Attorneys for Plaintiff."

134 And thereafter and on the 17th day of January, A. D. 1896, the court having heard the argument of counsel for the respective parties on said motion for a new trial, doth deny the same.

To which action on the part of the court in denying said motion the plaintiff by counsel then and there and at the time duly excepted.

And the said plaintiff was thereupon allowed ninety days in which to prepare and tender his bill of exceptions herein.

And inasmuch as the said several matters so produced, given in evidence, had and done in said cause aforesaid, objected and insisted upon as aforesaid, had and done as aforesaid, do not appear by the record of the finding and judgment of said court aforesaid, the said attorneys and counsel for said plaintiff did then and there propose their aforesaid exceptions to the opinion, finding and judgment of the said court, and the judge thereof, and requested him to put his seal and signature to this bill of exceptions, containing the said several matters so produced, given in evidence and had as aforesaid in this cause, according to the form of the statute in such case made and provided; and thereupon the said judge, at the request of said counsel for said plaintiff, did put his seal to this bill of exceptions and sign the same pursuant to the aforesaid statute in such case made and provided, and on, to wit, the 15th day of April, A. D. 1896.

JOHN A. RINER, *Judge.* [SEAL.]

O K.

THOMAS, BRYANT & LEE,

Def't's Att'ys.

Indorsed: 2758. Harry H. Dudley, plaintiff, vs. The Board of County Commissioners of the County of Lake, Colo., defendant. Bill of exceptions. Filed April 15th, 1896. Robert Bailey, clerk. By Charles W. Bishop, deputy clerk.

Assignment of Errors.

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

HARRY H. DUDLEY, Plaintiff in Error,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE,
Colorado, Defendant in Error.

Of the December term of A. D. 1896.

135 Afterwards, on, to wit, the first Monday of December in the same term, before the judges of the United States circuit court of appeals for the eighth judicial circuit, at the city of St. Louis, in the State of Missouri, U. S. A., comes the said plaintiff in error, Harry H. Dudley, by his attorneys, Daniel E. Parks and H. B. Johnson, Esquires, and says that in the record and proceedings aforesaid there is manifest error and in this, to wit :

The circuit court of the United States for the district of Colorado, and the judge of said court, Hon. John A. Riner, presiding, erred signally in admitting, and also in excluding evidence and testimony on said trial, before the court and jury, against the objection of the plaintiff thereon and thereat, and in this, to wit :

First. Said court and judge erred in not, on motion of said plaintiff, striking out the testimony given in answer to the question : " Q. Her husband was a citizen of Colorado ? " on page 35 of the bill of exceptions in this cause, viz : " A. Yes, sir."

Second. The said court and judge erred in admitting the evidence and testimony offered by the defendant of the amount of indebtedness of the defendant County of Lake at the time the bonds were issued, to wit : the 31st day of July, A. D. 1880, the offer and discussion of the admissibility of which before the court, is shown at pages 71, 72, 73 and 74 of the bill of exceptions.

Third. The court and judge erred in allowing the witness Newell to answer the question propounded to him by defendant, viz : " Q. Does that show the amount of the indebtedness of the county, on the first day of January, 1880 ? " Said question appearing at page 75 of the bill of exceptions, the answer thereto being, " A. Yes, sir."

Fourth. The court and judge erred in allowing the witness Newell to answer the question propounded to him by defendant, viz : " Q. Does it give a statement of the condition of the county's finances at that time ? " said question appearing on page 76 of the bill of exceptions, the answer thereto being, " A. Yes, sir ; it should."

Fifth. The court and judge erred in allowing the witness Newell to answer the question propounded to him by defendant, viz : " Q. When do the records show that the county commenced to keep what is called a regular semi-annual statement book ? " said question appearing on page 76 of said bill of exceptions, the answer thereto being, " I have not examined those old books which were kept in the

office, only glanced over them, and I do not know when that
136 book was started;" also "Q. This is the first book showing the financial condition of the county," the answer thereto being, "A. Yes, sir;" and also the question "Q. This is the beginning?" "A. Yes, sir;" also the question "Q. How far does that run from the time it begins?" said question beginning on page 75 of the bill of exceptions, the answer thereto being "A. It commences in January, 1880, and ends December 31st, 1887."

Sixth. The court and judge erred in allowing the witness Newell to answer the question, "Q. Now, is that the only book kept, or that was kept by the county, which shows these facts?" said question being on page 77 of said bill of exceptions, the answer thereto being, "A. Yes, sir."

Seventh. The court and judge erred in admitting in evidence the county clerk's account book mentioned and testified to and about in witness Newell's testimony, on page 77 of the bill of exceptions.

Eighth. The court and judge erred in allowing the witness Newell to answer the question, "Q. Now, Mr. Newell, will you indicate the pages which show the county's financial standing from the beginning of the book until the 31st day of December, I believe that is when these bonds were issued?" Said question appearing on page 77 of the bill of exceptions, the answer thereto being "A. It is found on pages 1, 2 and 3;" also in allowing said witness to answer the question "Q. Pages 1, 2, and 3 show the semi-annual statement to July 1st, 1880, is that right?" the answer thereto being, "A. Yes, sir."

Ninth. The court and judge erred in allowing the witness Newell to answer the question, "Q. Page 1 shows the statement of January 1st, 1880?" said question appearing on page 78 of said bill of exceptions, the answer thereto being, "A. Yes, sir."

Tenth. The court and judge erred in allowing the witness Newell to answer the question "Q. Are there papers copies of these first and second pages, and certified to?" on page 78 of said bill of exceptions, the answer thereto being, "A. Yes, sir."

Eleventh. The court and judge erred in allowing the witness Newell to answer the question, "Q. Now, turn to pages 21 and 22, what does that show," on page 79 of the bill of exceptions, the answer thereto being, "A. It shows the county's indebtedness in 1879."

Twelfth. The court erred in allowing the witness Newell to answer the question, "Q. It shows the county's indebtedness at
137 that time." "Q. Now turn to page 22, Mr. Newell, and tell us what that shows," said questions appearing on page 78 of the bill of exceptions, the answer thereto being "A. The indebtedness of 1881 and 1882."

Thirteenth. The court and judge erred in allowing the witness Newell to answer the question, "Q. What period does that end with?" said question appearing on page 78 of the bill of exceptions, the answer thereto being, "A. It ends with December, 1882."

Fourteenth. The court and judge erred in allowing the witness Newell to answer the question, "Q. Now, can you give us from that book the amount of the outstanding indebtedness of Lake county

on the 1st day of January, 1880?" the answer thereto being, "A. Yes, sir."

Fifteenth. The court and judge erred in allowing the witness Newell to answer the question, "Q. Now, then, tell us the amount of the indebtedness according to that book?" on page 78 of said bill of exceptions, the answer thereto being, "A. It is \$84,296.28."

Sixteenth. The court and judge erred in allowing the witness Newell to answer the question, "Q. Does that book show the amount of the indebtedness of Lake county on the 1st day of July, 1880?" the answer thereto being, "A. Yes, sir, it does."

Seventeenth. The court and judge erred in allowing the witness Newell to answer the question, "Q. What was that amount?" on page 78 of the bill of exceptions, the answer thereto being, "A. It is given here as \$198,294.57."

Eighteenth. The court and judge erred in allowing the evidence offered by the defendant, beginning with the eighth line from the bottom of page 79 of the bill of exceptions, and ending with line 10 on page 80 of said bill of exceptions.

Nineteenth. The court and judge erred in allowing the witness Newell to answer the question, "Q. Does it show the amount of outstanding indebtedness on the 1st day of January, 1881?" said question being on page 80 of said bill of exceptions, the answer thereto being, "A. Yes, sir."

Twentieth. The court and judge erred in allowing the witness Newell to answer the question, "Q. What is the amount?" the answer thereto being, "A. \$293,063.20."

138 Twenty-first. The court and judge erred in allowing the witness Newell to answer the question "Q. According to that book, is that outstanding indebtedness which you mentioned evidenced by warrants or bonds?" said question appearing on pages 80 and 81 of the bill of exceptions, the answer thereto being "A. It is evidenced by bonds."

Twenty-second. The court and judge erred in overruling the question propounded by plaintiff, on cross examination of the witness Newell, on page 85 of said bill of exceptions, as follows: "Q. You are familiar with the statutes, are you not, about semi-annual statements?"

"The COURT: You need not ask a question of law."

Twenty-third. The court and judge erred in admitting in evidence the original clerk's account book, and the substituted copy thereof, the said substituted copy being Exhibit 9, beginning at page 88 and ending at page 94 of said bill of exceptions.

Twenty-fourth. The court and judge erred in admitting the evidence offered by the defendant and its counsel in the offer thereof shown at page 94 of the bill of exceptions, such evidence purporting to be certified transcripts of registry of county warrants and orders from the records of the defendant County of Lake, showing the issuance of county warrants of said county from time to time, the amount of them and the purpose of them, etc., certified to by the county clerk and recorder, beginning on the 7th day of October, A. D. 1879 and ending on the 31st day of December, A. D. 1880, the

said statements having various certificates attached thereto of other dates, and is included, as stated in said offer, said evidence being received and marked Exhibit No. 10, being contained in said bill of exceptions from pages 94 to 294 thereof; said evidence being intended to show the outstanding indebtedness of the county of Lake by the warrant registry of said county, enumerating the warrants issued by said county and registered in said registry lists during the time covered thereby.

Pages 99 to 105, inclusive and pages 112 to 121, inclusive, of said bill of exceptions, being schedules of road warrants issued by said county in the years 1879 and 1880, amounting to about the sum of \$50,000; pages 108, 109, 110 and 111 of said bill of exceptions being schedules of warrants issued on the building fund of said county, in the year 1880, amounting to about the sum of \$25,000; pages 103 and 107 of said bill of exceptions being schedules of warrants issued by said county upon the contingent fund, in the 139 year of 1880 between February 17th and June 1st, amounting to the sum of about \$10,000; pages 122 to 229 inclusive of said bill of exceptions, contains schedules of county warrants drawn upon the general fund, for and during the year of 1880, between January 5th and June 19th, amounting to about the sum of \$125,000; pages 230 to 293 of said bill of exceptions, being schedule of warrants drawn on the general fund of said county, during the year 1879, between February 11th and December 30th, amounting to the sum of about \$96,000. Said schedules each purport to show when said warrants were issued, to whom issued, on what account issued, when presented to the county treasurer for payment, the total amount paid, principal and interest, and when paid.

Said schedules are certified to by the county clerk of said defendant county, as being true copies of the record, and were offered in evidence to show the outstanding indebtedness of the said defendant County of Lake at the time of the issuance of the bonds in controversy, said bonds being issued July 31st, 1880.

Twenty-fifth. The substance of the evidence consisting of the clerk's original account book, and substituted copy thereof, contained in Exhibit 9, at pages 88 to 94 of said bill of exceptions, upon which error is hereby assigned, is as follows:

The account purports to state the financial status of the defendant county, and to state the same more particularly in reference to its outstanding indebtedness.

The balance struck on the first page of the account (bill of exceptions page 88) is \$96,074.24, the account being credited January 1st, 1880, by outstanding indebtedness in the sum of \$84,296.28.

The second page of said account (bill of exceptions page 89) purports to show an expenditure account, on account of the road fund, showing an outstanding indebtedness January 1st, 1880 on account of road warrants of \$1,850.53. Said last-mentioned page, and also page 3 of said statement (bill of exceptions pages 89 and 90), purports to show the outstanding warrant debt of the said defendant county on the 1st day of July, 1880, in the sum of \$217,057.75.

Page 4 of said account (bill of exceptions page 91) purports to

show as follows: First. The condition of the road fund and the warrant debt outstanding on that score, showing such warrant debt July 1st, 1880, to be \$10,918.15; also the expenditure account on account of county building fund, showing no indebtedness on that score; also the expenditure account of the contingent fund, showing no indebtedness on that score; also the expenditure account of county bond fund, showing the county bonds outstanding July 1st, 1880, in the sum of \$10,750.

Page 5 of said account (bill of exceptions page 92) purports to show general expense account and status of the county fund January 1st, 1881, showing the amount of warrants outstanding January 1st, 1881, at \$293,063.20.

Page 6 of said account (bill of exceptions page 93) is a further account of the road fund, showing the amount of road fund indebtedness outstanding January 1st, 1881, to be \$19,499.38.

Said page 6 also purports to show a county building fund account, in warrants outstanding January 1st, 1881, to the amount of \$120.65, and also an expenditure account on account of county bond fund, showing county bonds outstanding January 1, 1881, in the sum of \$50,000. The bonds in question in this action.

Twenty-sixth. The court and judge erred in admitting in evidence Exhibit No. 29, purporting to be a semi-annual financial statement of the said defendant County of Lake, set forth in the bill of exceptions at pages 339*d*, *e* and *f* and 340, and offered in evidence by the defendant and its counsel as appears at pages 339*a*, *b*, and *c*, of said bill of exceptions, against the objection of the plaintiff then and there made, by his attorneys, in due time, form and manner.

Said supposed semi-annual statement purports to show the outstanding indebtedness of said defendant County of Lake on January 1st, A. D. 1880, as the same appeared by the records in the county clerk's office. Page 1 of said supposed statement (page 339*d* of the bill of exceptions) purports to show the outstanding warrant indebtedness of the defendant county, January 1st, 1880, to be \$96,074.24, also the outstanding indebtedness of the defendant county in road warrants at the same date to be \$3,172.12.

Pages 2, 3 and 4 of said supposed statement (bill of exceptions pages 339*e* and *f*, and page 340) purport to be a statement showing an account of the several funds of the county, as per semi-annual statement made by the county treasurer January 1, A. D. 1880, by which the county fund is shown to contain \$25,000; the State fund to contain a balance of \$13,945.94; the general school fund, \$10,868.51; the special school fund, district No. 2, \$31,159.52; the road fund, \$15,000; the contingent fund, \$3,988; the mute and blind fund, \$697.38; university fund, \$697.38; the school of mines fund, \$697.38; the agricultural fund, \$697.38; the insane fund, \$697.38; the military poll fund \$1,469.50; the interest on bonds fund, \$1,060.46; the city of Leadville taxes \$47,815.84; county license fund, balanced, and the city of Malta fund, \$2,512.12.

Page 4 of said supposed semi-annual statement also purports to contain a certificate purporting to be signed by the chairman of the board of county commissioners of said county and by the clerk of

said county; also an affidavit which purports to be the proof of publication of the said supposed report, made by one C. C. Davis, and subscribed and sworn to before a notary public December 16th, 1893, more than 13 years after said supposed semi-annual statement was made; said affidavit states that the affiant is the publisher of the "Carbonate Weekly Chronicle," a weekly newspaper published in said county of Lake, and that the notice of the semi-annual financial statement of Lake county, Colorado, showing the outstanding indebtedness of Lake county on January 1st, A. D. 1880, of which a copy is attached, was published in said newspaper in its issue dated the 7th day of February, A. D. 1880.

Twenty-seventh. The court and judge erred in admitting in evidence the certified copies of the proceedings of the board of county commissioners of said defendant county, offered by said defendants, with the said supposed semi-annual financial statement, which said proceedings are marked Exhibit 30, and are contained on pages 341 and 342 of the bill of exceptions.

The said exhibit at page 341 of the bill of exceptions, under date of January 26th, 1880, purports to show that on motion it was ordered that the semi-annual statement of the financial affairs of the defendant county, as required by section 447 of the General Laws of Colorado, be made by the clerk of the board and when so made and approved by the board, signed by the chairman and attested by the county clerk that the same be published in the "Carbonate Weekly Chronicle" and the "Leadville Weekly Democrat" two weekly newspapers published in the defendant county. The said exhibit at said page also sets forth, under date of December 16th, 1893, the certificate of the county clerk of said defendant county, certifying that the supposed order was truly copied from the records of the proceedings of the defendant board, then in the office of the county clerk.

The said exhibit, at page 343 of the bill of exceptions, under date of December 10th, 1880, purports to show that on motion it was ordered that the following-named persons be allowed the
142 amount set opposite their names, and warrants ordered drawn on the county fund for the same: "Leadville Democrat, prt. ann. statement, \$20.00."

The said exhibit at said page also sets forth, under date of December 16th, 1893, the certificate of the county clerk of the said defendant county, certifying that the supposed order was truly copied from the records of the proceedings of the defendant board, then in the office of the county clerk.

Said evidence in said exhibit being designed as a foundation to the introduction of said supposed semi-annual statement, and to evidence thereby that the defendant board had directed the semi-annual statement to be made and published, and that the defendant county had paid \$20 for publishing the same.

Twenty-eighth. The court and judge erred in admitting in evidence Exhibit 31, contained on pages 348 to 364, inclusive, of the bill of exceptions, as offered by the defendant and its counsel as shown on pages 343 and 244 of the bill of exceptions. Said Exhibit

31 purports to be a certified copy of the bond register of said defendant county, purporting to show the issuance of county bonds between December 30th, 1879 and August 1st, 1880; said registry purports to show the date of issuance, the number, to whom issued, the amount of interest due from April 1st, 1880 to April 1st, 1889. Pages 1 to 12, inclusive of said Exhibit 31, contained on pages 345 to 359 inclusive of the bill of exceptions, purport to show that the bond-registered and included in said pages of said exhibit were cancelled September 6th, A. D. 1880.

Said exhibit purports to show that all of said bonds were issued to L. E. Roberts and Walter H. Jones, bonds Nos. 55, 56, 56, 58, 59, 60, 61, 62, 63, and 64, inclusive, for one thousand dollars each, and bonds Nos. 65 and 66, for five hundred dollars each, being issued to said Jones, and that the balance of the said bonds were issued to said Roberts. Said exhibit also purports to show that interest has been paid upon said bonds up to about April 29th, 1886.

Said exhibit has attached thereto what purports to be the certificate of the county clerk of the said defendant county, dated January 8th, 1894, certifying that the same is a correct copy of the registry of county bonds known as public building bonds as the same appears of record in his office in the registry of bonds, on pages 1 to 10 inclusive. Said exhibit purports to show that there were two sets of bonds issued in the sum of fifty thousand dollars each, that the first set issued was taken up and cancelled, and that the second set issued is outstanding.

143 Twenty-ninth. The court and judge erred in excluding the evidence offered in the answer of Daniel E. Parks, to the following question: "Q. You may state, if you know, what portion of these warrants have been adjudicated to be void and not binding upon the county," contained on page 365 of the bill of exceptions, the ruling of the court thereon being shown at the top of page 366 of the bill of exceptions.

Thirtieth. The court and judge erred in excluding the evidence of the witness Parks, in answer to the question: "Q. You may state whether or not any, and if so, what portion, of these warrants went into the funding bonds that were issued in 1881," contained on said page 366 of the bill of exceptions.

Thirty-first. The court and judge erred in excluding the evidence of the witness Parks, in answer to the question: "Q. Yes, you may state whether any of these warrants were sued upon in the case of Rollins against Lake County," contained on page 467 of the bill of exceptions.

Thirty-second. The court and judge erred in overruling the offer of evidence made by the plaintiff and his attorneys on pages 367 and 368 of the bill of exceptions, as follows:

"I offer to prove by the witness (Parks) that these warrants fully constitute the entire outstanding indebtedness, according to this book, of Lake county, on July 1st, 1880, either went into the issue of \$500,000 of funding bonds that were issued by Lake county in 1882, or were involved in the case of Rollins against Lake County, in both of which cases the warrants were held illegal and void by

the Supreme Court of the United States, and the county released from the payment of that indebtedness, now, to support that offer I suggest to the court that the public records would not show the date of these warrants, when they were funded they were cancelled and destroyed. That funding was the funding of the entire outstanding warrant indebtedness of the county, as it had to be under the law, and when these warrants were given up and bonds given in their place, they were cancelled and destroyed, and it is impossible to follow each numbered warrant that went into these funding bonds; there were \$500,000 of these warrants funded."

Thirty-second. The court and judge erred in excluding the evidence offered by plaintiff and his attorneys on page 369 of the bill of exceptions, as follows:

"Then, that we may get the benefit of the ruling of the court, I desire to prove by the records of the decisions in the Lake County case against Rollins, and Lake County vs. Graham and by other recorded evidence of this and other courts, and by the records of Lake county, that the indebtedness summed up as outstanding indebtedness of Lake county, in county warrants, July 1st, 1880, on page 2 of the book entitled 'County Clerk's Account Book,' a transcript from which has been admitted in evidence, has all been adjudicated and held to be void by the courts, and that as a matter of fact, it was illegal and void at the time it was issued."

The discussion of counsel and court relative to said offer appears on pages 369 and 370 of the bill of exceptions.

Thirty-third. The court and judge erred in excluding the evidence offered by plaintiff and his counsel, contained in Exhibit 32, on pages 373 to 387 inclusive of the bill of exceptions, the offer of the same in evidence being as follows: (Bill of exceptions pages 371 and 372.)

Mr. JOHNSON: As Mr. Parks has now procured the order (Exhibit 32) he referred to, we will offer this copy of the order of the board of county commissioners of Lake county.

Mr. PARKS: I will go on the stand and testify that I drew and prepared the original order and had it passed by the board, and that this is a copy of the original. It is an order of the board of county commissioners made on the 18th day of October, 1886, as a result of taking an account of the outstanding indebtedness, in which they recognized and ordered to be paid, the legal portion of the debt outstanding, including this indebtedness, and directing the treasurer not to pay the invalid part. This record shows the indebtedness as they ascertained it to amount to \$24,815.90; by including the valid warrant indebtedness they, by necessary implication, excluded the payment of all other indebtedness, much of which is included in this evidence offered by defendant in the offer of warrant registry, clerk's account, etc.

The COURT: The objection is sustained, let it be filed as an exhibit in the case.

Said Exhibit 32 shows the number, date, amount, to whom issued, and whether funded in judgment or outstanding of the valid war-ant

indebtedness of the county of Lake, incurred from the organization of the defendant county to the 2nd day of May, 1881, enumerates such indebtedness, and shows the amount of the same outstanding and unpaid to be about \$24,815.90.

145 Of all the county warrants enumerated in Exhibit Ten (10) of the bill of exceptions, the evidence of which was admitted by the court below to show the outstanding debt of the defendant county when the bonds in suit were issued, viz: July 30th, 1880, the following-described warrants *only* are enumerated and designated in Exhibit No. 32, as valid when the bonds were issued, viz:

Schedule of valid Lake County debts outstanding and unpaid when the court-house bonds were issued, as shown by Exhibit 10 offered by defendant and Exhibit 32 offered by plaintiff.

Page.	Number.	Amount.
1.	1879 Register..... 7	\$100.00
"	"..... 9	508.84
"	"..... 10	81.33
"	"..... 11	153.50
"	"..... 13	28.00
"	"..... 14	3.00
"	"..... 16	100.00
"	"..... 17	24.00
"	"..... 19	430.90
"	"..... 20	100.00
"	"..... 21	2.20
"	"..... 24	208.50
"	"..... 29	2.15
"	"..... 30	2.50
"	"..... 31	9.00
"	"..... 32	105.00
"	"..... 34	105.28
"	"..... 36	20.25
"	"..... 37	71.67
"	"..... 38	569.95
2.	"..... 45	220.00
"	"..... 46	3.00
"	"..... 47	3.00
"	"..... 48	2.20
"	"..... 50	5.00
"	"..... 51	10.50
"	"..... 53	90.00
"	"..... 54	2.25
"	"..... 59	82.20
"	"..... 60	2.15
"	"..... 61	123.21
"	"..... 63	770.41
"	"..... 64	5.00
"	"..... 66	5.00

2.	67	5.00
"	68	5.00
"	69	5.00
"	70	5.00
"	71	5.00
"	73	5.00
"	75	30.00
"	82	5.00
"	85	5.00
3.	91	5.00
"	94	5.00
"	100	5.00
"	102	9.50
"	103	29.15
"	104	692.00
"	108	93.75
"	110	5.70

Forward... .. \$4,864.19

Page.	Number.	Amount.
	Amount forwarded..	\$4,864.19
3.	1879 Register..... 113	6.60
"	..... 114	2.00
"	..... 115	2.00
"	..... 116	335.15
"	..... 126	397.00
"	..... 127	30.00
"	..... 129	6.60
4.	..... 131	100.00
"	..... 133	25.00
"	..... 134	14.25
"	..... 135	90.82
"	..... 136	157.29
"	..... 137	100.00
"	..... 140	50.00
"	..... 141	206.38
"	..... 142	299.00
" 143	31.50
" 144	25.00
" 145	150.00
" 146	42.00
" 147	11.50
" 149	27.50
" 150	1.20
" 152	68.65
" 155	108.00

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4.	156	2.50
"	157	37.50
"	158	35.00
"	159	25.00
"	160	2.50
"	161	100.00
"	163	2.20
"	164	42.00
"	165	338.84
31.	1880 Register	1273	.....	470.00
"	.....	1274	.....	11.00
38.	.....	1582-6	.....	255.00
"	.....	1589	.....	25.00
"	.....	1590	.....	5.43
"	.....	1594	.....	2.20
"	.....	1595	.....	207.20
"	.....	1598	.....	8.00
"	.....	1599	.....	2.40
"	.....	1601	.....	2.50
"	.....	1602	.....	2.50
"	.....	1603	.....	2.00
"	.....	1605	.....	283.90
"	.....	1607	.....	130.50
"	.....	1609	.....	12.60
"	.....	1610	.....	1.90
"	.....	1612	.....	257.25
"	.....	1613	.....	270.75
"	.....	1614	.....	143.60

Forward..... \$9,730.90

Page.	Number.	Amount.
	Amount forwarded..	\$9,730.90
38.	..... 1616	50.00
"	..... 1617	19.25
39.	..... 1618	62.15
"	..... 1619	18.60
"	..... 1620	6.75
"	..... 1621	194.25
" 1624	30.00
" 1625	5.00
" 1626	2.15
" 1627	5.00
" 1628	32.00
" 1629	1,554.52
40. 1666	5.00
" 1678	89.80

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40.	1682	26.32
41.	1726	45.00
44.	1839	23.80
45.	1880	2.60
"	1885	56.78
"	1894	616.04
"	1897	10.00
"	.....	1898	.....	60.00
"	.....	1900	.....	81.25
"	.....	1901	.....	45.00
"	.....	1902	.....	45.00
"	.....	1905	.....	10.00
"	.....	1906	.....	28.45
"	.....	1907	.....	210.00
"	.....	1908	.....	349.40
"	.....	1909	.....	387.00
"	.....	1911	.....	20.00
"	.....	1912	.....	35.00
"	.....	1913	.....	30.00
"	.....	1914	.....	30.00
"	.....	1915	.....	42.50
"	.....	1916	.....	60.00
51.	.....	2160	.....	34.30
54.	.....	2272	.....	35.00
"	.....	2273	.....	8.20
"	.....	2274	.....	177.00
"	.....	2275	.....	.98
"	.....	2277	.....	20.00
62.	.....	2531	.....	29.00
"	.....	2540	.....	10.50
68.	.....	2804	.....	57.40
79.	.....	3251	.....	50.00
"	.....	3252	.....	5.00
"	.....	3253	.....	15.00
"	.....	3255	.....	2.20
"	.....	3256	.....	27.58

 \$14,492.67

Assessed valuation of defendant county of A. D. 1880, \$11,126,489, bill of exceptions page 47. Debt limit when bonds were issued \$66,758.93 (defendant's answer alleged and admits such limit). Valid debt in Exhibit 10, as shown by Exhibit No. 32, \$14,492.67. Amount of bonds involved in this action \$50,000, as shown by the bond registry, Exhibit 31.

Amount of bonds (Exhibit 31) and valid debt (Exhibit 32), \$64,492.67, when bonds were issued July 31st, 1880. Excess of debt limit over bonds and valid outstanding debt when the bonds were issued, \$2,266.26.

Thirty-fourth. The court and judge erred in overruling the plaintiff's offer of evidence contained on page 388 of the bill of exceptions as follows :

Mr. JOHNSON : I think we might offer, I think enough appears by the opinions, the two decisions of the court. I offer the opinions of the supreme court in the Graham and Rollins cases.

Thirty-fifth. The court and judge erred in excluding the evidence offered by the plaintiff as shown on page 391 of the bill of exceptions, which offer contemplated evidence showing that the warrants issued subsequent to January 1st, 1880, in suit were funded in the funding bonds of said defendant county issued January 1st, 1882.

The circuit court of the United States and the judge of said court, Hon. John A. Riner, presiding, further erred signally on and in the said trial of said cause before the court and jury, against the rights of the plaintiff therein and thereat, and in this, to wit :

Thirty-sixth. The court and judge erred in refusing to instruct the jury as requested by the plaintiff in error in and by the first instruction, on page 393 of the bill of exceptions, in the words and figures following :

"The jury are instructed that the amendment to article eleven, section six, of the constitution of the State of Colorado, adopted November 6, 1888, operates to validate the bonds and coupons the validity of which is involved in this action, even though they may have been originally issued in excess of the valuation prescribed by the constitution or the statutes of Colorado."

Thirty-seventh. The court and judge erred in refusing to instruct the jury as requested by the plaintiff in error in and by the second instruction, on page 393 of the bill of exceptions, in the words and figures following :

"The court instructs the jury that the plaintiff in this cause, Harry H. Dudley, being a non-resident of the State of Colorado and a resident of the State of New Hampshire, as appears by the evidence in this case, had the legal right to purchase the bonds and coupons in question for the purpose of enforcing the same by this action, and such purchase as shown by the evidence in this case is lawful and valid and operated to transfer the legal title of said bonds and coupons to him."

150 Thirty-eighth. The court and judge erred in refusing to instruct the jury as requested by the plaintiff in error in and by the third instruction, on page 394 of said bill of exceptions, in the words and figures following :

"The court instructs the jury that the sale of the bonds and coupons in question involved in this suit, to Mr. Edward W. Rollins, about the time the bonds were issued, as testified to by him and undisputed in this case, for a valuable consideration, made him a *bona fide* purchaser thereof for value and without notice of any claimed defect or invalidity of said bonds and coupons, and the *bona fides* of such purchase by him for value without notice characterizes the said bonds and coupons so purchased and renders all subsequent purchasers thereof *bona fide* purchasers."

Thirty-ninth. The court and judge erred in refusing to instruct the jury as requested by the plaintiff in error in and by the fourth instruction, on page 394 of said bill of exceptions, in the words and figures following:

"The jury are instructed that in determining whether the constitutional or statutory limitation was exceeded by the issuance of said bonds, they will take into consideration the assessed valuation of 1880, in force at the time the bonds were issued, and not that of 1879, in force at the time of the vote of the people."

Thirty-ninth. The court and judge erred in refusing to instruct the jury as requested by the plaintiff in error in and by the fifth instruction, on page 395 of said bill of exceptions, in the words and figures following:

"The jury are instructed that the validity of an obligation issued by a county, in so far as it is affected by the limitation of indebtedness, depends upon the state of the valid indebtedness outstanding at the time the valid obligation is issued, and if the jury believes from the evidence that the valid and outstanding indebtedness of defendant, at the time of the issuance of the bonds in question, and including said bonds, did not exceed the limit prescribed by the constitution or the statute, then they will find a verdict for the plaintiff."

Fortieth. The court and judge erred in refusing to instruct the jury as requested by the plaintiff in error in and by the sixth instruction, on page 395 of said bill of exceptions, in the words and figures following:

"The jury are instructed that the burden of proof to show that the valid outstanding indebtedness of defendant, at the
151 time the bonds were issued, was such that, by the issuance of the bonds, the limitation of indebtedness prescribed by the constitution or the statutes of Colorado was exceeded, rests upon defendant."

Forty-first. The court and judge erred in refusing to instruct the jury as requested by the plaintiff in error in and by the seventh instruction, on page 396 of the bill of exceptions, in the words and figures following:

"The jury are instructed that under the constitution as it stood at the time the bonds in question were issued, the people of a county having an assessed valuation of more than five millions could authorize the contraction of a debt amounting to six dollars on each thousand dollars of valuation, and that the validity of the debt thus contracted could not be affected by any outstanding indebtedness of such county."

Forty-second. The court and judge erred in instructing the jury to return a verdict in favor of the defendant, and in receiving and recording the same in said court, which verdict was and is in the words and figures following, on page 396 of the bill of exceptions, to wit:

In the Circuit Court of the United States for the District of Colorado.

HARRY H. DUDLEY

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE.

We, the jury in the above entitled cause, find the issues herein joined for the defendant.

(Signed)

C. H. McLAUGHLIN, *Foreman.*

Forty-third. The court and judge erred in entering judgment upon said verdict in favor of the defendant and against the plaintiff, as shown on page 396 of the bill of exceptions.

Forty-fourth. The court and judge erred in overruling the motion of the plaintiff made and filed in said cause to set aside the verdict of the jury rendered upon the trial of said cause, and the judgment entered thereon in favor of the defendant in said cause and grant a new trial therein to the said plaintiff upon the merits of said cause, upon the grounds stated in said motion, said motion being contained on pages 397 and 398 of the bill of exceptions. The action of the court in overruling said motion being recorded on page 389 of said bill of exceptions.

152 Forty-fifth. The court and judge erred in admitting improper evidence on the trial of said cause against the objection of the plaintiff and in favor of the defendant.

Forty-sixth. The court and judge erred in rendering judgment in favor of the defendant and against the plaintiff, as said judgment is against the law of the land.

And the said plaintiff in error, Harry H. Dudley, prays that the judgment aforesaid given and rendered under the circumstances and in the manner aforesaid, may be reversed and annulled and altogether for naught held, and that the said plaintiff in error may be restored to all things which he has lost by occasion of the said judgment.

H. B. JOHNSON &
DAN'L E. PARKS,

Attorney for Plaintiff in Error.

Indorsed: No. 2758. In the United States circuit court of appeals. Harry H. Dudley vs. The Board of County Commissioners of the County of Lake, Colorado. Assignment of errors. Filed June 8, 1896. Robert Bailey, clerk. Dan'l E. Parks, att'y for pl'ff in error, Denver, Colo.

Petition for Writ of Error and Citation in Error.

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

HARRY H. DUDLEY, Plaintiff in Error,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE,
Colorado, Defendant in Error. }

To the honorable the United States circuit court of appeals of the eighth judicial circuit, sitting at the city of St. Louis, in the State of Missouri, U. S. A., and the judges thereof:

The petition of Harry H. Dudley, a citizen of the State of New Hampshire, the above-named plaintiff in error, respectfully shows to this court:

First. That on the 7th day of January, A. D. 1896, on a trial in the circuit court of the United States for the district of Colorado of this cause below, judgment was erroneously entered therein against him, the said plaintiff in error, and in favor of the defendant in error for costs of suit.

Second. That signal errors intervened in said cause on said trial, prejudicial to the said plaintiff in error and advantageous to
153 the said defendant in error, by reason of which said errors said judgment below against said plaintiff in error and in favor of the said defendant in error, was rendered and is now had, which judgment remains of record in the court below, unreversed and in full force and effect.

Third. That such errors consist of the erroneous rulings of the court below upon the law of the case, the admissibility of evidence on the trial of said cause below, against the objection of the plaintiff in error, of instructions to the jury which tried the case, etc., in rendering final judgment against the said defendant, and refusing a new trial in said court below.

Fourth. That exceptions to the said decision and rulings of the court below on the trial of said cause below were, and have been, duly, and in due time, form and manner, preserved in the record of this cause below, by bill of exceptions, duly made, tendered and signed, by the judge presiding on the trial in said cause below, on the application of the said plaintiff in error.

Fifth. That said plaintiff in error has in due time, form and manner assigned errors upon the record below, in this court, by assignment of errors, duly made and signed by his counsel and filed herein setting forth the errors relied on herein to reverse said judgment below.

In consideration of the premises, the said plaintiff in error now comes, and prays that a writ of error may, in due time, form and manner, be issued in this cause to the said court below, commanding it and the judges thereof, to transmit to this court, in due time, form and manner, the record of this cause in said court below, and of the

said proceedings and judgment therein, for the consideration and judgment of this court; said writ of error to be issued and made returnable in accordance with the rules and practice of this court; and that a citation in error in this cause, may also, in accordance with the rules and practice of this court, and in due time, form and manner, be issued out of this court, directed to the said defendant in error, and requiring the said defendant in error to be and appear in this cause and court on a certain day, to be therein mentioned, to show cause why the said judgment, so as aforesaid rendered
 154 against the said plaintiff in error, should not be corrected, and why speedy justice should not be done to your petitioner in that behalf.

And your petitioner will ever pray, &c.

Dated this 5th day of June, A. D. 1896.

HARRY H. DUDLEY,
Plaintiff in Error,
 By DAN'L E. PARKS,
Attorney for Plaintiff in Error.

Indorsed: No. 2758. U. S. circuit court of appeals of the eighth judicial circuit. Harry H. Dudley vs. The Board of County Commissioners of the County of Lake, Colorado. Petition for writ of error and citation in error. Filed June 8, 1896. Robert Bailey, clerk. Dan'l E. Parks, att'y for pl'ff in error, Denver, Colo.

UNITED STATES OF AMERICA, }
District of Colorado, } ss:

In the Circuit Court of the United States for the District of Colorado.

HARRY H. DUDLEY, Plaintiff in Error,
 vs.
 THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY }
 of Lake, Defendant in Error. } No. 2758.

The clerk will please make a transcript in error in the above-entitled cause, and of the following proceedings therein, viz:

Summons, and proof of service, complaint, answer, second replication, filed December 2nd, 1893, journal entries on trial and judgment, motion for a new trial and overruling of same, bill of exceptions, bond in error and assignment of errors.

Dated June 10th, 1896.

Yours, &c.,

DAN'L E. PARKS,
Attorney for Plaintiff in Error.

Indorsed: No. 2758. In the circuit court of the U. S., district of Colo. Harry H. Dudley vs. The Board of County Commissioners of the County of Lake. Præcipe for transcript on writ of error. Filed Jun- 13, 1896. Robert Bailey, clerk.

THE UNITED STATES OF AMERICA, }
District of Colorado.

Know all men by these presents, that we, Harry H. Dudley, of Concord, New Hampshire, as principal, and — — — are held and firmly bound unto The Board of County Commissioners of the County of Lake, State of Colorado, as *sureties* in the full and just sum of five hundred (\$500) dollars, to be paid to the said The Board of County Commissioners of the County of Lake, its successors, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of June in the year of our Lord one thousand eight hundred and ninety-six.

Whereas, lately at the November term, A. D. 1895, of the circuit court of the United States, for the district of Colorado, in a suit pending in said court between Harry H. Dudley plaintiff, and The Board of County Commissioners of the County of Lake, defendant, judgment was rendered against the said Harry H. Dudley for costs of suit and the said Harry H. Dudley, having obtained a writ of error to the United States circuit court of appeals for the eighth circuit to reverse the judgment of the said circuit court and a citation directed to the said The Board of County Commissioners of the County of Lake citing and admonishing said board to be and appear in the United States circuit court of appeals, for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said Harry H. Dudley plaintiff shall prosecute said writ of error to effect, and answer all damages and costs, if he fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

HARRY H. DUDLEY. [SEAL.]
 EDWARD W. ROLLINS. [SEAL.]
 JOHN H. POOLE. [SEAL.]

Sealed and delivered in presence of—
 F. W. ROLLINS.

Approved :
 JOHN A. RINER, *Judge.*

Justification.

THE UNITED STATES OF AMERICA, } ss :
District of Colorado,

John H. Poole surety on the within bond, being first duly sworn, deposes and saith that he is worth in both or either real or personal property in Colorado the sum below set opposite his name, that is to say: the sum of five hundred (500) dollars, over and above all

his just debts and liabilities, and in property subject to levy and sale upon execution.

JOHN H. POOLE. \$500.00.

156 Subscribed and sworn to before me, at Denver, this 8th day of June, A. D. 1896.

[SEAL.]

ALBERT E. GRIER,
Notary Public.

Indorsed: Gen. No. 2758. Circuit court of the United States, district of Colorado. Harry H. Dudley vs. The Board of County Commissioners of the County of Lake, Colorado. Bond, \$500.00. Filed this 10th day of June, A. D. 1896. Robert Bailey, clerk.

Writ of Error to United States Circuit Court of Appeals, Eighth Circuit.

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, } ss:
District of Colorado,

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Colorado, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the November term, 1895, thereof, between Harry H. Dudley, plaintiff, and The Board of County Commissioners of the County of Lake (Colorado), a manifest error hath happened, to the great damage of the said Harry H. Dudley, plaintiff, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals, for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals, for the eighth circuit, on or before the seventh day of July, 1896, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further
157 to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 10th day of June, in the year of our Lord, one thousand eight hundred and ninety-six, and

Seal United States Circuit
Court, District of Colo-
rado.

of the Independence of the United States
the 120th year. Issued, at office in Den-
ver, in said district, with the seal of the
circuit court of the United States, for the
district of Colorado, and dated as aforesaid.

ROBERT BAILEY,

Clerk Circuit Court United States, District of Colorado.

Allowed by—

JOHN A. RINER, *Judge.*

Return.

THE UNITED STATES OF AMERICA, }
District of Colorado, } ss :

In obedience to the command of the within writ, I herewith trans-
mit to the honorable, the United States circuit court of appeals a
duly certified transcript of the record and proceedings in the within-
entitled case, together with all things concerning the same.

Seal United States Circuit
Court, District of Colo-
rado.

In witness whereof, I hereto subscribe
my name, and affix the seal of said cir-
cuit court of the United States for the
district of Colorado, at Denver, in said
district, this 22nd day of June, 1896.

ROBERT BAILEY, *Clerk,*

By CHARLES W. BISHOP,

Deputy Clerk.

Gen. No. 2758. United States circuit court of appeals, eighth
circuit. Harry H. Dudley, plaintiff in error, vs. The Board of
County Commissioners of the County of Lake, Colorado, defendant
in error. Writ of error to circuit court U. S., district of Colo-
rado. Dan'l E. Parks, attorney for plaintiff in error.

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Citation.

United States Circuit Court of Appeals.

THE UNITED STATES OF AMERICA, }
District of Colorado. }

The United States of America to the Board of County Commis-
sioners of the County of Lake (Colorado), defendant in error,
Greeting:

You are hereby cited and admonished to be and appear in the
United States circuit court of appeals for the eighth circuit, at the
city of St. Louis, Missouri, sixty days from and after the day this
citation bears date, pursuant to a writ of error, filed in the clerk's
office of the circuit court of the United States, for the district of
Colorado, sitting at Denver, in said district, wherein Harry H. Dud-
ley is plaintiff in error, and you are defendant in error, to show

cause if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable John A. Riner, judge of the United States district court for the district of Wyoming, assigned to hold the circuit court of the United States for the district of Colorado, this 10th day of June, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN A. RINER,

*Judge of the United States District Court for the District of Wyoming,
Assigned to Hold the Circuit Court of the United States for the
District of Colorado.*

Proof of Service.

THE UNITED STATES OF AMERICA, } ss:
District of Colorado,

On this — day of — A. D. 189—, personally appeared — — before me, the subscriber, clerk of the — court of the United States, for the district of Colorado, and makes oath that he delivered a true copy of the within citation to — —.

We acknowledge service of above citation on the defendant in error, this 10th day of June, 1896.

THOMAS, BRYANT & LEE,
Attorneys for Defendant in Error.

Sworn to and subscribed before me, this — day of — A. D. 189—.

— —, Clerk,
By — —, Deputy Clerk.

159 Gen. No. 2758. United States circuit court of appeals, eighth circuit. Harry H. Dudley, plaintiff in error, vs. The Board of County Commissioners of the County of Lake, Colorado, defendant in error. Citation. Filed in United States circuit court for the district of Colorado this 10th day of June, A. D. 1896. Robert Bailey, clerk. Dan'l E. Parks, attorney for plaintiff in error.

UNITED STATES OF AMERICA, } ss:
District of Colorado,

I, Robert Bailey, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing pages numbered from one to three hundred and fifty-five both inclusive to be a true, perfect and complete transcript and copy of the complaint, summons, and proof of service, answer, second replication, filed December 2nd, 1893, journal entries on trial and judgment, motion for a new trial and overruling of same, bill of exceptions, bond in error and assignment of errors heretofore filed or had and entered of record in said court, and in a certain cause lately in said

court pending, wherein Harry H. Dudley was plaintiff and The Board of County Commissioners of the County of Lake was defendant, as fully and completely as the same still remain on file or of record in my office, at Denver.

Seal United States Circuit
Court, District of Colo-
rado.

In testimony to the above, I do here-
unto sign my name and affix the seal of
said court, at Denver, in said district,
this twenty-second day of June, A. D.
1896.

ROBERT BAILEY, *Clerk*,
By CHARLES W. BISHOP,
Deputy Clerk.

Filed June 29, 1896.

JOHN D. JORDAN, *Clerk*.

160

(Appearance for Plaintiff in Error.)

And on the sixth day of July, A. D. 1896, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May
Term, 1896.

HARRY H. DUDLEY, Plaintiff in Error,	} No. 821.
<i>vs.</i>	
BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF Lake, Colorado.	

The clerk will enter *my* appearance as counsel for the plaintiff in error.

DANIEL E. PARKS,
H. B. JOHNSON,
Att'ys for Pl'ff in Error.

Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1896. No. 821. Harry H. Dudley, plaintiff in error, *vs.* Board of County Commissioners of the County of Lake. Appearance. Filed Jul- 6, 1896. John D. Jordan, clerk. Daniel E. Parks, counsel for pl'ff in error.

(Appearance for Defendant in Error.)

And on the twenty-seventh day of July, A. D. 1896, an appearance for defendant in error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May
Term, 1896.

HARRY H. DUDLEY, Plaintiff in Error,	}	No. 821.
vs.		
BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF Lake.		

The clerk will enter *my* appearance as counsel for the defendant
in error.

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C. S. THOMAS.
W. H. BRYANT.
H. H. LEE.

Endorsed: U. S. circuit court of appeals, eighth circuit, May
term, 1896. No. 821. Harry H. Dudley, plaintiff in error, vs Board
of County Commissioners of the County of Lake. Appearance.
Filed Jul- 27, 1896. John D. Jordan, clerk. C. S. Thomas, W. H.
Bryant, H. H. Lee, counsel for def't in error.

(Appearance for Plaintiff in Error.)

And on the eighteenth day of September, A. D. 1896, an appear-
ance of counsel for plaintiff in error was filed in the clerk's office of
said circuit court of appeals in said cause in the words and figures
following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May
Term, 1896.

HARRY H. DUDLEY, Plaintiff in Error,	}	No. 821.
vs.		
BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF Lake, Colorado.		

The clerk will enter my appearance as counsel for the plaintiff
in error.

J. E. McKEIGHAN.

Endorsed: U. S. circuit court of appeals, eighth circuit, May
term, 1896. No. 821. Harry H. Dudley, plaintiff in error, vs. Board
of County Commissioners of Lake Co. Appearance. Filed Sep. 18,
1896. John D. Jordan, clerk. J. E. McKeighan, counsel for pl'ff in
error.

(Appearance for Plaintiff in Error.)

And on the second day of February, A. D. 1897, an appearance
of counsel for plaintiff in error was filed in the clerk's office of said
circuit court of appeals in said cause in the words and figures fol-
lowing:

162 United States Circuit Court of Appeals, Eighth Circuit, December Term, 1896.

HARRY H. DUDLEY, Plaintiff in Error,	}	No. 821.
<i>vs.</i>		
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY of Lake, Colorado.		

The clerk will enter my appearance as counsel for the plaintiff in error.

E. F. RICHARDSON.

Endorsed: U. S. circuit court of appeals, eighth circuit, December term, 1896. No. 821. Harry H. Dudley, pl'ff in error, *vs.* The Board of County Commissioners of the County of Lake, Colorado. Appearance. Filed Feb. 2, 1897. John D. Jordan, clerk. E. F. Richardson, counsel for pl'ff in error.

(Appearance for Plaintiff in Error.)

And on the fourth day of February, A. D. 1897, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1896.

HARRY H. DUDLEY, Plaintiff in Error,	}	No. 821.
<i>vs.</i>		
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY of Lake, Colorado.		

The clerk will enter my appearance as counsel for the plaintiff in error.

H. B. JOHNSON.

Endorsed: U. S. circuit court of appeals, eighth circuit, December term, 1896. No. 821. Harry H. Dudley, pl'ff in error, *vs.* The Board of County Commissioners of the County of Lake, Colorado. Appearance. Filed Feb. 4, 1897. John D. Jordan, clerk. H. B. Johnson, counsel for pl'ff in error.

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(Appearance for Defendant in Error.)

And on the fourth day of February, A. D. 1897, an appearance of counsel for defendant in error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1896.

HARRY H. DUDLEY, Plaintiff in Error,	}	No. 821.
<i>vs.</i>		
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY of Lake, Colorado.		

The clerk will enter my appearance as counsel for the defendant in error.

GEORGE R. ELDER.

Endorsed: U. S. circuit court of appeals, eighth circuit, December term, 1896. No. 821. Harry H. Dudley, plaintiff in error, *vs.* The Board of County Commissioners of the County of Lake, Colorado. Appearance. Filed Feb. 4, 1897. John D. Jordan, clerk. George R. Elder, counsel for def't in error.

(Argument Commenced.)

And on the fourth day of February, A. D. 1897, in the record of proceedings of said circuit court of appeals is an entry in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1896.

THURSDAY, February 4, 1897.

HARRY H. DUDLEY, Plaintiff in Error,	}	No. 821.
<i>vs.</i>		
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY of Lake, Colorado, Defendant in Error.		

In error to the circuit court of the United States for the district of Colorado.

164 This cause having been passed and called for hearing this day, argument was commenced by Mr. E. F. Richardson in behalf of the plaintiff in error, continued by Mr. George R. Elder and Mr. C. S. Thomas for the defendant in error, but not being concluded at the hour of adjournment further argument was postponed until tomorrow morning.

(Submission.)

And on the fifth day of February, A. D. 1897, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1896.

FRIDAY, February 5, 1897.

HARRY H. DUDLEY, Plaintiff in Error,	} No. 821.
<i>vs.</i>	
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY of Lake, Colorado, Defendant in Error.	

In error to the circuit court of the United States for the district of Colorado.

This cause having been called this day for further hearing, argument was continued by Mr. C. S. Thomas in behalf of the defendant in error and concluded by Mr. H. B. Johnson for the plaintiff in error. Thereupon the cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

(*Opinion.*)

And on the twelfth day of April, A. D. 1897, an opinion of said United States circuit court of appeals was filed in said cause in the words and figures following:

165 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1896.

HARRY H. DUDLEY, Plaintiff in Error,	} No. 821. In Error to
<i>vs.</i>	
THE BOARD OF COUNTY COMMISSIONERS OF the County of Lake, Colorado, Defendant in Error.	

the Circuit Court of
the United States for
the District of Colo-
rado.

Mr. H. B. Johnson and Mr. E. F. Richardson (Mr. Daniel E. Parks was with them on the brief) for the plaintiff in error.

Mr. George R. Elder (Mr. C. S. Thomas, Mr. W. H. Bryant and Mr. H. H. Lee were with him on the brief) for defendant in error.

Before Sanborn and Thayer, circuit judges, and Lochren, district judge.

Statement.

This action was brought to recover the amount of a large number of coupons, aggregating \$26,500 exclusive of interest, which had formed part of and been attached to bonds of said county of Lake, in the State of Colorado, which had been issued to the amount of \$50,000, on or after September 6, 1880, but bearing date July 31, 1880, for the purpose of erecting necessary public buildings for said county. Said bonds bore interest at the rate of ten per cent. per annum, payable annually on the first day of April of each year, at the office of the county treasurer of said county, upon delivery of

the attached interest coupons. The bonds were redeemable at the pleasure of the county after ten years, and were due and payable at the office of the county treasurer twenty years from the date thereof.

The coupons maturing upon these bonds before April 1, 1884, were all paid as they matured, at the office of said county treasurer, but no coupons maturing at or after that date have been paid, the coupons sued on being among those unpaid.

The answer of the defendant denied knowledge or information sufficient to form a belief as to whether plaintiff was the owner and holder of any of the coupons, or had become the purchaser of them for a valuable consideration, without notice of any claim affecting their validity.

166 But the principal defense, variously stated in the answer, was, in substance, that under the constitution and laws of the State of Colorado, the Board of County Commissioners of said County of Lake had not, when they issued said bonds, any power or lawful authority to issue the same, for the alleged reason that by the issue of such bonds a debt of said county was contracted, or the prior debt of said county increased, to an amount prohibited by the constitution of said State, and that from the existing facts and circumstances shown by the records of said county, all purchasers of said bonds were bound to take notice of their invalidity.

Section 6 of article XI of the constitution of Colorado, as it stood prior to the year 1888, was as follows:

"No county shall contract any debt by loan in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges, and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county following, to wit: Counties in which the assessed valuation of taxable property shall exceed five millions of dollars, \$1.50 on each thousand thereof; counties in which such valuation shall be less than five millions of dollars, \$3.00 on each thousand dollars thereof. And the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not exceed twice the rate upon the valuation last herein mentioned: Provided, that this section shall not apply to counties having a valuation of less than one million of dollars."

The said bonds contained a recital upon the face of each bond, as follows:

"This bond is one of a series of fifty thousand dollars, which the board of county commissioners of said county have issued for the

purpose of erecting necessary public buildings, by virtue of and in compliance with a vote of a majority of the qualified voters of said county, at an election duly held on the 7th day of October, A. D. 1879, and under and by virtue of and in compliance with an act of the General Assembly of the State of Colorado, entitled 'An act concerning counties, county officers and county governments, and repealing laws on those subjects,' approved March 24th, A. D. 1877, and it is hereby certified that all the provisions of said act have been fully complied with by the proper officers in the issuing of this bond."

Secs. 20 to 25 inclusive of said act were also printed upon said bonds, and contained all the provisions of said act, relative to the action of the board of county commissioners in determining upon the necessity of creating an indebtedness for the purpose of erecting necessary public buildings, making or repairing roads and bridges, and by order specifying the amount required, and submitting the question of incurring the debt to a vote of the qualified electors at a general election, by posting of notices; also prescribing the form of ballots and manner of voting and canvassing the vote, and the authority of the county commissioners in case the vote should be carried to contract the indebtedness, and the limitations upon such authority, and the form and purport of the bonds to be issued, and provision to be made for the payment of the interest and principal of the bonds, and a provision that they should not be sold at a discount of more than fifteen per cent. of their par value.

Sec. 21 of said act contained a provision, as follows: "Provided, that the aggregate amount of indebtedness of any county exclusive of debts contracted prior to July first, 1876, in which the assessed valuation of property shall exceed one million of dollars, for all purposes, shall not be in excess of the following ratio, to wit: Counties in which the assessed valuation of property shall exceed five million of dollars, \$6.00 on each thousand dollars thereof; counties in which the assessed valuation of property shall be less than five millions, and exceed one million of dollars, \$12.00 on each thousand dollars thereof."

The action of the board of county commissioners preliminary to and in submitting to vote of the qualified electors of said county, at the general election held October 7, 1879, the question of creating an indebtedness of \$50,000, for the purpose of erecting necessary public buildings, and \$5,000, for the building and construction of public roads and bridges, was strictly in conformity with said act. The election was duly held, and the vote on that question duly had and canvassed and found and declared to be carried. And all the acts and doings were properly recorded, and the bonds prepared, executed and issued in strict accordance with the provisions of said act. And the bonds were sold for ninety-five cents on the dollar of their par value, and have, since within one year of their issue, been held and owned by purchasers for full value without actual notice of any illegality or infirmity in said bonds. The plaintiff is the holder of the coupons sued upon, by delivery of the same with prop-

erly executed written assignments thereof to him, by the former owners of such coupons, but without payment by him of any money therefor.

The assessed valuation of taxable property in said county of Lake for the year 1879 was \$3,485,628, and for the year 1880 was \$11,124,489, and such assessment was completed on the first day of September in each of said years, by the action of the board of equalization.

Sec. 30 of the act above referred to made it the duty of the board of county commissioners of each county to make out semi-annual statements at the regular sessions in January and July, and publish them in some weekly newspaper published in the county, or if no such newspaper be so published, to cause such statements to be posted in three conspicuous places in the county, one being the court-house door, showing the amount of debt owing by the county, in what it consists, what payments have been made thereon, the rate of interest, and a detailed account of receipts and expenditures for the preceding months, and striking a balance showing the deficit or the balance in the treasury. "And the statement thus made, in addition to being published as before specified, shall also be entered of record by the clerk of the board of county commissioners, in a book to be kept by him for that purpose only, which book shall be kept open to the inspection of the public at all times."

There was no evidence in the case that any such semi-annual statement made by the Board of County Commissioners for said County of Lake at the January or July sessions of said board in the year 1880, had ever been entered of record in any book kept for that purpose only, as required by said act. The fair inference from the testimony is that no such record was ever made.

Upon the trial, the defendant to prove its allegation that on July 31, 1880, the date of said bonds, and also at the time they were issued, the aggregate outstanding indebtedness of said county of Lake was largely in excess of the amount of the extreme limitation fixed by the constitution of said State, and the act aforesaid, offered in evidence a book kept in the years 1880 and 1881 by the county clerk of said Lake county, called the "County Clerk's Account Book," and purporting to contain, among other things, detailed statements of the financial condition of said county on January 1, 1880, July 1, 1880, and January 1, 1881, and the same was admitted in evidence by the court, over the objection and exception of plaintiff, that it was not the record provided for by said act, nor the semi-annual statement of the board required by said act. Much other evidence tending to show the existence of outstanding warrants and indebtedness of said county at the time of issuing said bonds, to an amount largely in excess of the aggregate amount of indebtedness which the county could, under said constitutional limitations, lawfully incur, was offered by defendant, and admitted by the court, over the objections of the plaintiff that the same was incompetent and immaterial.

At the conclusion of the evidence, the court refused all of the plaintiff's requests for instructions to the jury, and instructed the

jury to return a verdict for the defendant; to which refusal and instruction exceptions were duly taken by the plaintiff. The jury accordingly found for the defendant, and judgment for the defendant was entered upon the verdict.

LOCHREN, J., after stating the case as above, delivered the opinion of the court:

1. The plaintiff by the delivery to him of the coupons and written assignments thereof, became the legal owner of such coupons, and entitled to maintain an action upon them, whether he had actually paid the former owners any consideration for them or not. Holding them by valid written transfers from former *bona fide* holders for value, he succeeded to all rights of such former holders. No defense is pleaded which makes it material whether the plaintiff, under such circumstances, did or did not pay value for the coupons. *Sheridan v. Mayer*, 68 N. Y., 30; *Commissioners v. Bolles*, 94 U. S., 104, 109. The instruction to the jury asked for in plaintiff's second request was correct, and the refusal of the court to give such instruction was error.

2. A county is an organized political subdivision of the State. It has such power, and such only, to contract loans and incur other forms of indebtedness as is expressly or by fair implication granted to it by the legislature of the State, which has plenary authority over that subject, as it has over all ordinary subjects of legislation, except in so far as its authority is taken away, curtailed or restricted by the controlling force and effect of the provisions of the State constitution.

Sec. 6 of article XI of the constitution of Colorado is wholly restrictive in its effect and operation, and does not by its terms authorize any county to incur any form of indebtedness for any purpose. It forbids the contracting of a debt of a specified kind, except for specified purposes, and within specified limits, and forbids the contracting of indebtedness of any and all kinds beyond specified limits, and then prescribes an enlarged limit as to indebtedness, after a county shall have been authorized by vote of the qualified electors, in the manner indicated, with a provision in respect to bonds, if any be issued. But it does not by its own terms grant to any county the power to incur indebtedness, even within the specified restrictions. The authority to grant such power, within such restrictions, therefore, necessarily remains in the legislature, which might in its discretion, prescribe further limitations and restrictions, and provide in detail in respect to the manner in which the power should be executed, and in respect to what acts should be done, and what record made in the execution of such power, and as to the effect of such acts and records.

The bonds in question in this case were issued under the provisions of the act of March 24, 1877, which is expressly referred to in the recital in the bonds, and six sections of which were printed upon the bonds. This act by its terms commits to the board of county commissioners the power to determine the necessity of creating an indebtedness for the erection of public buildings, and of submitting

the question to a vote of the qualified electors at a general election, and of issuing the bonds, if the vote is favorable, keeping within the limitation contained in sec. 21, in respect to the aggregate indebtedness of the county at the time of issuing the bonds. The granting of these powers necessarily intrusts to the board of county commissioner the power and duty of determining whether the proposition to create the indebtedness was carried at the election, and the ascertainment of the fact that the aggregate amount of all forms of the county indebtedness was within such amount, that it would not, by the issue of the bonds, be made to overpass the prescribed limitation. Hence, except for the provision contained in sec. 30 of the same act, requiring the board to make and publish the semi-annual statements of the indebtedness and financial condition of the county, and requiring the clerk of the board to record such statements in a book to be kept for that purpose only, and to be open to public inspection, the recitals in the bonds above quoted, would be conclusive and would estop the county in a suit by a *bona fide* holder of the bonds or coupons. *Knox v. Aspinwall*, 21 How., 589; *Columbia v. Evans*, 92 U. S., 484; *County of Clay v. Society*, 104 U. S., 579; *Commissioners v. Bolles*, 94 U. S., 104; *Evansville v. Dennett*, 161 U. S., 434, 446; *Wesson v. Saline Co.*, 73 Fed. Rep., 719; *Chaffee County v. Potter*, 142 U. S., 355.

In *Chaffee County v. Potter*, last cited, where the recital in the bonds contained a certificate that the total amount of the issue did not exceed the limit prescribed by the constitution of Colorado, and had been duly authorized by a vote of the qualified electors of the county of Chaffee, at the general election named, it was held that the county was estopped to dispute these recitals in an action upon coupons by an innocent holder for value.

The case of *Sutliff v. Lake County*, 147 U. S., 230, deserves special attention, as the bridge bonds, coupons from which were sued upon in that case, were issued under the same act, and upon the authority of the same vote of the qualified electors, as were the public building bonds which are under consideration in this case. In the *Sutliff* case it was held, that as sec. 30 of the same act under which the bonds were issued, made it the duty of the board of county commissioners to make out and publish semi-annual statements, showing the indebtedness, if any, of the county, and that such statements should be entered of record by the clerk of the board in a book to be by him kept for that purpose only, and to be open to the inspection of the public, a person about to purchase such bonds was charged with the duty of examining this public record provided for by the very act under which the bonds were issued, and from that, inform himself whether the amount of the issue stated in the bonds increased the aggregate indebtedness of the county beyond the constitutional limit, which was there held to be identical with the like limitation contained in the act, namely, six dollars on the thousand of the assessed valuation, the total assessed valuation of the taxable property in that county being more than five millions, and that because of such public record of such semi-annual statements, the county was not estopped to prove that before such bonds were issued

the indebtedness of the county had passed the constitutional and statutory limit.

The theory of that case is that a purchaser of bonds issued under that act would have constructive notice of what the record of the semi-annual statement provided for by the act, and which it was his duty to examine, would have shown, had he in fact examined such record. The fact that such record actually existed was assumed and not questioned in the Sutliff case. But in this case it is clearly shown that there never were any such semi-annual statements, or record thereof, covering any of the time which could affect the legality of these bonds. As there was no such record in existence as the act required and contemplated, there was no record which a purchaser of these bonds was bound to examine, or which would be constructive notice to him of the aggregate indebtedness of the county when the bonds were issued. Such purchaser was therefore entitled to rely on the recitals in the bonds. And as one of these recitals was a certificate that all the provisions of the act had been fully complied with by the proper officers in the issuing of the bonds, and as a provision of that act limiting the issue of the bonds by the aggregate of all the indebtedness of the county was in effect identical with the constitutional provision on the same subject, the recital was equivalent to a certificate that this provision of the constitution had been complied with, and brings the case within the decision in *Chaffee County v. Potter*, *supra*.

It has often been held that in the absence of any statutory public record, a county or municipality may be estopped by similar recitals in bonds, from showing that when the bonds were issued there was an aggregate outstanding indebtedness rendering the issue of bonds illegal. *Marcy v. Oswego*, 92 U. S., 637; *Humboldt v. Long*, 171 U. S., 642, 645; *Buchanan v. Litchfield*, 102 U. S., 278, 292; *Sherman v. Simons*, 109 U. S., 735; *Dallas v. McKenzie*, 110 U. S., 686; *Wilson v. Salamanca*, 99 U. S., 499.

The debt created by the bonds in this case was incurred, not at the time the board of commissioners determined that it was necessary, nor when the qualified voters of the county gave authority to incur it, nor at the date of the bonds, they having been antedated, but at the date, later than September 6, 1880, when the bonds were in fact issued and sold. The bonds recite that the whole issue is \$50,000, and this recital was notice to purchasers of the bonds, of the creation of an indebtedness of the county, to that amount. The assessed valuation of the taxable property of the county of Lake, according to the assessment which was completed by equalization on September 1, 1880, was \$11,124,489. The assessed valuation, in view of the vote authorizing the creation of the indebtedness, would admit of a lawful aggregate of indebtedness of that county, to the extent of upwards of \$66,000. So that the recited amount of that issue of bonds was not of itself notice to a purchaser that the lawful aggregate limit of indebtedness had been passed, even if such purchaser was bound to take notice of the assessed valuation of the taxable property of the county, as was held in *Dixon v. Field*, 111 U. S., 83. As said by the court in *Chaffee County v. Potter*, 142 U. S., 355, 363

"The purchaser might even know, indeed it may be admitted that he would be required to know, the assessed valuation of the taxable property of the county, and yet he could not ascertain, by reference to one of the bonds and the assessment-roll, whether the county had exceeded its power, under the constitution, in the premises."

The court therefore erred in overruling the plaintiff's objections to the county clerk's account book, the warrant register, and the proof of publication of financial statements. None of this evidence was material, as none of it constituted constructive notice to a *bona fide* purchaser of the bonds.

3. A question not suggested by the answer in the case remains to be considered. The first part of sec. 6, of article XI, of the constitution of Colorado, above quoted, as applicable to the class of counties having an assessed valuation of taxable property exceeding five millions of dollars, in the absence of any vote of the qualified electors, restricts the amount of debt by loan which the county can be allowed to contract in any one year, to \$1.50 on each thousand of such assessed valuation. It is questioned whether this limitation upon the amount of debt by loan which the county may be allowed to contract in any one year, does not continue, even after authority has been given by vote of the qualified electors, to create an aggregate indebtedness to the extent, it may be, of six dollars on each thousand of such assessed valuation.

The contention that the restriction referred to, respecting the amount of debt by loan which a county may be allowed to contract in any one year, without such vote, continues after the changed condition effected by such vote, appears to rest upon what seems to us to be a misconception of a sentence in the opinion in *Lake County v. Rollins*, 130 U. S., 662, 669. Under the stipulation in that case (page 664), the only question in the case was whether the limitations contained in sec. 6 of article XI aforesaid, were restrictive only

172 of the power of counties to create debts by loan, or restricted further the power to create and incur all forms of indebtedness; it being admitted by the stipulation, that if the general limitations expressed in that section covered all forms of indebtedness, and were not confined to debts by loan exclusively, the defendant in that action was entitled to judgment. Mr. Justice Lamar pointed out that the first clause of the section, down to where the subject of aggregate indebtedness is considered, speaks only of debts by loan. He then added, "Here the matter of indebtedness by loan is completed, and the section passes to a broader subject." In view of the exact question then under consideration, this language means that at the point of the section indicated, the matter of debt by loan exclusively, is completed, and that thenceforward the section passes to a broader subject, embracing all other forms of indebtedness as well as debt by loan. It is obvious that every sentence of the entire section may enlarge, limit or in some way qualify, the power to contract debts by loan. The provision in respect to submitting the question of incurring indebtedness to the qualified electors, contemplates the submitting of specific propositions, and if the vote is in favor of incurring the debt, the provision that if bonds are issued

they shall run not less than ten years, necessarily provides that such debt when so authorized, may be created by loan.

The case of *The People v. May*, 9 Colo., 80, does not touch the question of how much indebtedness by loan may be contracted by a county in any one year, after authority has been given by a majority vote of the qualified electors to contract the indebtedness. In that case, as in the Rollins case, the sole question considered arose upon the contention that the constitutional restriction contained in said section 6, as to the aggregate amount of county indebtedness, should be regarded only as a limitation of county indebtedness by loan. The court held, as in the Rollins case, that the general limitations as to aggregate indebtedness, embraced all forms of county indebtedness.

The provisions of sec. 6 aforesaid divide themselves into two general clauses, distinct from each other, and each applicable to a condition differing from that to which the other is applicable. The first clause extending down to the preposition "unless," prescribes the restrictions and limitations in respect to the power of contracting indebtedness by counties where there has been no vote of the qualified electors authorizing the creation of specific indebtedness, and not only limits the aggregate amount of indebtedness that can be incurred for all purposes, and in all forms, but also limits the amount of indebtedness by loan that can be created in any one year. The second clause following the preposition "unless," provides for a changed and different condition, in which a county, by vote of a majority of its qualified electors, upon a proposition submitted to them at a general election, has been authorized to create a specific indebtedness. In that case a single and different limitation is prescribed, namely, that that aggregate debt of the county shall not be made to exceed twice the amount limited in the other case, and a provision (contemplating debt by loan) that the bonds, if any be issued therefor, shall not run less than ten years. But there is no limitation in such case, as to the amount of the

173 indebtedness so authorized which can be created in any one year. It would be singular, indeed, if after authorizing a county, upon vote of its qualified electors, to create a specific indebtedness for the erection of necessary public buildings, the same provision should cripple the power to erect such buildings, by requiring that the long-time bonds authorized, should only issue and be sold in small annual installments; making the county wait, perhaps a series of years, before getting enough money to warrant it in beginning the erection of the necessary public buildings, and be paying in the meantime interest on the earlier bonds, the proceeds of which would be lying idle, awaiting the accumulation of enough to begin with. Neither the grammatical construction of the section nor any sound reason justifies the importation into the last clause of the section, of the restriction in the first clause as to the amount of debt by loan which can be created in any one year. It may be added, that the legislative construction of this section of the constitution, as shown by sec. 21 of the act of March 24, 1877, under which these bonds were issued, conforms to the views here expressed,

and that the Supreme Court, in *Sulliff v. Lake County*, 147 U. S., 230, 234, refers to this statute as being, in respect to limitations, in conformity with the constitution.

4. The county of Lake received full consideration for these bonds. Most of them were taken directly by the contractor who erected the public buildings for which they were issued. They passed immediately to *bona fide* holders for full value; the county acknowledged and ratified them, by paying the interest upon them as it matured, for several years. If it were conceded that after the Board of County Commissioners of Lake County had been, by vote of the qualified electors, empowered to create a debt of \$50,000, to erect necessary public buildings, they were required to execute that power by issuing not more than \$16,500 of the \$50,000 in any one year, and they issued the whole \$50,000 at once, instead of issuing the same in yearly installments, the case would not be one of lack of power to issue all the bonds, but a case where the power existed, but was irregularly exercised. In such case, the payment of interest on the bonds for several years, estops the county from asserting such irregularity as a defense. *Supervisors v. Schenck*, 5 Wall., 772; *County of Clay v. Society*, 104 U. S., 579; *Anderson County v. Beal*, 113 U. S., 227; *Moulton v. Evansville*, 25 Fed. Rep., 382; *McKee v. Vernon Co.*, 3 Dillon, 210; *Portsmouth Bank v. Springfield*, 4 Fed. Rep., 276.

The circuit court erred in directing the jury to return a verdict for the defendant. The judgment of the circuit court is accordingly reversed, and the case is remanded for a new trial.

THAYER, J., dissenting :

I am unable to concur in the views expressed by my associates in the foregoing opinion. My disagreement with them arises out of the fact that I am not able to read section 6, article eleven of the constitution of Colorado (quoted in the statement) as they have seen fit to construe it. Without going into the subject at length, it will suffice to say that, in my judgment, the first paragraph of section 6, article eleven of the constitution of Colorado, fixes an absolute limit to the amount of indebtedness created by loan, which a county may

174 contract in any one year, either with or without the sanction of a popular vote, such limit being \$1.50 per thousand of the assessed valuation of taxable property in counties where such valuation exceeds five million dollars. This was the construction of the constitutional provision in question which seems to have been adopted in *Lake County v. Rollins*, 130 U. S., 662, 669, and in *The People ex rel. v. May*, 9 Col., 80, 86, 87; but in the absence of these adjudications, I should entertain the same view, founded upon the language of the statute and the probable motive of the law-maker. The framers of the Colorado constitution intended, as I think, to impose such restrictions upon counties as would compel them to act prudently, no matter what might be the will of the people, and such restrictions as would prevent them, as far as possible, from exhausting their power to contract debts by overborrowing in a single year. To this end they prohibited counties absolutely from borrowing money, except for one purpose, and limited the amount that migh

be borrowed, even for that purpose, during a single year. Such being my interpretation of the constitutional provision in question, it follows therefrom that the trial court acted properly in directing a verdict for the defendant, because each bond showed on its face that the aggregate debt thereby created in a single year was \$50,000, and because the purchasers of the bonds were bound to take notice of the amount of the assessed valuation, which valuation did not authorize the creation of a debt by loan in a single year, to an amount exceeding \$16,500. *Dixon County v. Field*, 111 U. S., 83; *Hedges v. Dixon County*, 150 U. S., 182; *Lake County v. Graham*, 130 U. S., 674. The plaintiff below was not an innocent purchaser of the bonds in suit, but was affected with knowledge of a want of power in the county to issue the bonds, which rendered the same void. My associates apparently agree with me that the debt evidenced by the bonds in suit was a debt contracted by loan, so that nothing need be said on that point. The judgment being, in my opinion, for the right party, on uncontradicted facts disclosed by the record, I think it should be affirmed.

Filed April 12, 1897.

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(Judgment.)

And on the twelfth day of April, A. D. 1897, in the record of the proceedings of said circuit court of appeals, is an entry of judgment in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1893.

MONDAY, April 12, 1897.

HARRY H. DUDLEY, Plaintiff in Error,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY
of Lake, Colorado, Defendant in Error. } No. 821.

In error to the circuit court of the United States for the district of Colorado.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Colorado, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, reversed with costs, and that Harry H. Dudley have and recover against The Board of County Commissioners of the County of Lake, Colorado, the sum of three hundred eighteen and $\frac{1}{10}$ dollars for his costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the said circuit court with directions to grant a new trial.

April 12, 1897.

(Motion for Order Enlarging Time to File Petition for Rehearing.)

And on the twenty-eighth day of April, A. D. 1897, a motion for order enlarging time to file petition for rehearing was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

176 In the United States Circuit Court of Appeals for the Eighth Circuit.

HARRY H. DUDLEY, Plaintiff in Error,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF LAKE COUNTY, Defendants in Error.

Comes now the above-named defendant in error, by its attorneys, and respectfully petitions this honorable court for an order extending the time within which to file a petition for rehearing until the 20th day of May, A. D. 1897; and because of this motion said defendant in error respectfully represents and shows to this honorable court that judgment was rendered in said cause on the 20th day of April, A. D. 1897, and the time within which, under the rules, the petition can be filed, to wit, on or before the end of the term, expires on Saturday, May 1st, A. D. 1897; that the defendant in error has had no opportunity to see the opinion of the court or properly to prepare a petition for rehearing in the cause. For these reasons it respectfully asks this honorable court to grant the extension of time hereinabove referred to.

THOMAS, BRYANT & LEE,

Attorneys for Defendant in Error.

Endorsed: No. 821. Harry H. Dudley, pl'ff in error, vs. Board of Commissioners of Lake County. Motion def't in error for order enlarging time to file petition for rehearing. Filed Apr. 28, 1897. John D. Jordan, clerk.

(Order Enlarging Time to File Petition for Rehearing.)

And on the twenty-eighth day of April, A. D. 1897, in the record of the proceedings of said circuit court of appeals is an order enlarging time to file petition for rehearing in said cause in the words and figures following:

177 United States Circuit Court of Appeals, Eighth Circuit,
December Term, 1896.

WEDNESDAY, April 28, 1897.

HARRY H. DUDLEY, Plaintiff in Error,	} No. 821.
<i>vs.</i>	
BOARD OF COUNTY COMMISSIONERS OF LAKE COUNTY, Defendant in Error.	

In error to the circuit court of the United States for the district of Colorado.

Upon motion of counsel for the defendant in error, it is now here ordered that special leave be granted said defendant in error to file a petition for a rehearing in the above-entitled cause at the May term, A. D. 1897, of said court, on or before the 20th day of May, 1897.

April 28, 1897.

(Signed)

A. M. THAYER,
U. S. Circuit Judge.

(Stipulation as to Filing Petition for Rehearing.)

And on the thirty-first day of May, A. D. 1897, a stipulation as to filing petition for rehearing was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

In the Circuit Court of Appeals for the Eighth Circuit.

HARRY H. DUDLEY, Plaintiff in Error,	}
<i>vs.</i>	
THE BOARD OF COUNTY COMMISSIONERS OF LAKE COUNTY, Defendants in Error.	

It is hereby stipulated and agreed by and between the parties to the above-entitled litigation that the petition for rehearing filed by the defendant in error may be filed on or before the 1st day of June, A. D. 1897, and shall be considered as filed within the time specified in the rules of this court, or the time may be extended to the 1st day of June, A. D. 1897.

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DANIEL E. PARKS,
H. B. JOHNSON,
E. F. RICHARDSON,
Att'ys for Pl't in Error.
GEORGE R. ELDER,
THOMAS, BRYANT & LEE,
Att'ys for Def't in Error.

Endorsed: 821. Circuit court — appeals for the eighth circuit.
H. H. Dudley *vs.* Board Co. Commissioners Lake County. Stipulation as to time for filing pet'n for rehearing. Filed May 31, 1897.
John D. Jordan, clerk.

(Petition for Rehearing.)

And on the thirty-first day of May, A. D. 1897, a petition for a rehearing was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

179 In the United States Circuit Court of Appeals for the Eighth Circuit.

HARRY H. DUDLEY, Plaintiff in Error,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF LAKE COUNTY, Defendant in Error.

Petition for Rehearing.

Comes now the appellee herein and respectfully petitions this honorable court for a rehearing in the above-entitled cause and for a vacation of the judgment rendered therein, and in support of said petition appellee respectfully presents the following points,
180 facts and authorities in connection with the record and the opinion rendered.

We fear that the court has, in the crowded condition of its docket, failed to give due consideration to some portions of the record and to some of the adjudicated cases cited in our former brief, by reason whereof it reached the conclusion announced in its opinion.

Every good citizen should be anxious to uphold the sanctity of private contracts, and, to instill due respect for their sacredness, should urgently insist upon the enforcement of public contracts. If the people as a whole do not pay their debts, it cannot be expected that individuals will evince much regard for their own obligations. But, on the other hand, no private individual should be required to pay a forged instrument or any other obligation that is not justly and honestly his. And this is equally true of the public. An unlawful contract attempted to be entered into by corrupt and inefficient public officers should not only be cancelled by the courts, but justice should be meted out to the officers thus acting. We do not think that the courts by a forced construction of constitutions and statutes should, in their desire to uphold a public obligation, teach the people that fraud may go unpunished. We think that this court, like every other court, should give a fair, reasonable and just construction to every provision of the constitution and statutes of the State of Colorado, but should not in a zeal to compel the payment of municipal obligations which happen to be held by citizens of other States, cause the people to believe that it is the province of this or any other court to see that every bond or obligation of a municipality, however fraudulent in its execution or unjust in its enforcement, must be paid to the last dollar. We do not think that considerations of this kind have influenced
181 this court; at the same time, we are conscious of the impression which, since this decision, prevails in this community

that all municipal obligations of counties or cities are susceptible of future enforcement in the Federal courts. The fact that this court was divided in its opinion would show that no such influence controlled the decision in this case; yet we recognize the force of the suggestion, that where a county has issued its bonds for the building of a court-house, and has actually had the court-house built and in its possession, it should be required to pay for the same. While it does not appear in this case from the record that these bonds were issued for the building of a court-house, yet it appears so by inference. As a matter of fact, the building of a court-house by Lake county was in many respects as gross a fraud as was ever perpetrated upon any people. These bonds represent but a fraction of the obligations which dishonest officers through fraudulent contractors attempted to pile up against the county, while the actual cost of construction was less than the amount represented by these bonds. The people of the county have paid almost to their last dollar, and we believe it should be the duty of every court to scrutinize carefully its obligations and only compel it to pay such as not only are clearly just, but are unquestionably authorized by the constitution and statutes.

Imbued with these feelings, we ask the court to consider carefully the points which we desire to make.

I.

Was Dudley a Bona Fide Holder for Value of These Bonds?

The court says that error was committed in the refusal of
 182 the court to give the plaintiff's second request. While it may be in a measure immaterial to whom a county pays its debt, if it is a just and valid obligation, we think the court erred in the first point stated in the opinion. On this question we call attention to one comparatively late decision of the Supreme Court of the United States. There a plaintiff brought suit, and the evidence was almost substantially the same as in this case as to his *bona fide* holdings. It appeared that he had been given an assignment of bonds for which there was no consideration. The Supreme Court held, under the circumstances, that it would be presumed that he took them from parties who were not entitled to sue in the Federal courts. We ask the court to consider this case carefully.

Lytle vs. Lansing, 147 U. S., 59.

The remarkable circumstances attending Dudley's ostensible purchase of the bonds in suit, his ignorance of their transfer to him for years after the bills of sale were executed, his want of possession both of the bonds and the instruments evidencing their transfer, his parting with absolutely no consideration whatever therefor, his ignorance of the institution of the suit or of its existence until long after it was brought, all these things rob him completely of any presumption of *bona fides*. They do more than this. They clearly indicate that the real owners of these bonds are not and never were *bona fide* holders, and that as a consequence they felt compelled to

make the transfer to Dudley, that they might shield themselves behind his presumptive ignorance of all the facts which invalidated them. They also clearly indicate that Roberts, the contractor, knew and that they were aware of his knowledge of the invalidity of the issue.

183 Besides this, the testimony indisputably establishes the actual ownership of a large proportion of the bonds in suit by citizens of Colorado (testimony of Wright, p. 72 *et seq.*), who transferred them to Dudley only to enable the latter to bring suit in the Federal court. In the face of these facts, is it not apparent that by the decision your honors have announced, all that is necessary to give a Federal court jurisdiction, all that is necessary to constitute a *bona fide* holder in a case like this, is to make a transfer without consideration to a citizen of another State, wholly without his knowledge, and then bring suit in his name, without his knowledge also.

The opinion is inconsistent with the doctrine announced in *Lytle vs. Lansing*, and with the utmost respect we venture to suggest that it cannot stand against the latter either upon principle or authority.

II.

Recitals in the Bond.

The court, in our judgment, fails to give due effect to the decisions of the Supreme Court concerning the effect of recitals in a bond as against a constitutional provision. While it may be true that were it not for the provisions of the constitution of Colorado, the legislature would have the right to confer plenary power upon counties to contract an indebtedness, the constitution, as a matter of fact, steps in and curtails the power of the legislature, and beyond its limitations, this curtailment amounts to an absolute prohibition. As repeatedly declared by the Supreme Court of the United States, this provision of the constitution is an "express and positive limitation upon the legislative power itself." If this is the interpretation of

the constitution by the Supreme Court, and if the legislature
184 cannot in any way confer the power to create a debt, we are at a loss to understand how it can confer a power to make recitals in a bond that will do away with the constitution. None of the cases cited by the court, on page 5 of its opinion, with the exception of *Chaffee County vs. Potter*, arose under constitutional provisions. The case of *Wesson vs. Saline County*, reported in 73 Federal Reporter, 917, was decided by the circuit court of appeals for the seventh circuit on the same day that it determined the case of *Graves vs. Saline County*. The *Graves* case was decided by the Supreme Court of the United States, and is reported in the same volume of reports with *Evansville vs. Dennett*. *In the Graves case the court expressly holds that where there is a constitutional limit beyond which a county cannot go, there can be no estoppel by any admission or even by receiving and enjoying the proceeds of the bonds.*

Graves vs. Saline County, 161 U. S., 359.

Evansville *vs.* Dennett, decided by the Supreme Court on the same day with the Graves case, does not in any manner conflict with this ruling. That case involved simply a construction of the charter provisions of a city organized by the legislature. The legislature had plenary powers over municipal incorporations, and could of course invest them with any power it saw fit, and no question of constitutional construction was considered. Chaffee County *vs.* Potter, and National Life Insurance Company *vs.* The Board of Education, decided by this court, seem to be the only cases which expressly decide that a county can estop itself by recitals from showing that the constitution has been violated. In the Potter case, the question of the constitutionality of a law investing a board of commissioners with power to defeat a constitutional inhibition by a recital

185 in a bond was neither discussed by counsel nor considered by the court. This court, of course, is bound by the Potter case, but not more so than by those subsequently decided, and which modify or limit its general operation. We think the case of Sutliff *vs.* Lake County disposes of the Potter case, and is based upon a correct interpretation of the constitution. The court will note that Mr. Justice Gray dissented in the Potter case and delivered the opinion in the Sutliff case. The Sutliff case has been followed in the case of Graves *vs.* Saline County, and in all the other decisions of the court since it was rendered. A careful consideration of these cases demonstrates that the county had, and that the legislature could give it, no right to make any recital which would estop it from the defense of constitutional violation.

Buchanan *vs.* Litchfield, 102 U. S., 278.

Dixon Co. *vs.* Field, 111 U. S., 83.

Sutliff *vs.* Lake Co., 147 U. S., 230.

Graves *vs.* Saline Co., 161 U. S., 359.

III.

The Evidence as to Semi-annual Statements.

The court says that there is no evidence in the record that any semi-annual statements, as required by section 30 of the act under which the bonds were issued, were ever made out. We do not know whether it is necessary to go over the evidence in the record upon this point, or not. We presume the court examined the record carefully and saw what it contains. Nevertheless, we call attention to

page 119 of the Record, Exhibit 30, which recites, after stating that

186 it was the regular January meeting of the board of county commissioners and noting the presence of the commissioners, the following resolution:

"On motion, it is ordered that the semi-annual statement of the financial affairs of the county, as required by section No. 447 of the General Laws of Colorado, be made by the clerk of this board, and when so made, approved by this board, signed by the chairman and attested by the county clerk, that the same be published in the *Carbonate Weekly Chronicle*, the *Leadville Weekly Democrat*, two weekly newspapers published in said county of Lake."

On page 114 will be found the semi-annual financial statement of the county, as published in the *Carbonate Chronicle*, the paper referred to in the resolution of the board, and on page 79 will be found the same statement as set out in the book of statements kept at that time. We would also call the court's attention to the testimony of Mr. Newell, beginning upon page 70 of the Record, in which he introduces the book containing the semi-annual statements made out and preserved by the county during these periods.

We confess that, with this evidence in the record, and with the evidence of Mr. Newell, we find it difficult to understand upon what theory the court is able to say that there was no evidence in the case that these semi-annual statements were kept and made. Does the court mean to say that because a county clerk of a county, for instance, should fail to record a deed in a book kept for deeds, but should record it in some other book in his office, that this deed would not be considered a record, and that the court could say that there was no evidence that a deed had ever been recorded? And suppose that a deed, when offered for record, was labeled a bill of sale; would the court construe this, although the instrument
187 itself was, in fact, a deed, not to be such an instrument? The statement of the court upon this point is so at variance with what we have always understood to be the law that we must believe it was based upon the brief filed by counsel for the plaintiff in error, and not upon a careful examination of the record. The supreme court of Pennsylvania, in a case already called to the attention of the court, has held that if such a record as this was not kept, a purchaser of bonds would be charged with what it ought to contain, and this rule is sanctioned by Judge Dillon, and seems to be sanctioned by the Supreme Court.

Millerstown vs. Frederick, 114 Pa. St., 435.

Dillon on Municipal Corporations, sec. 529a and notes.

Doon Township vs. Cummins, 142 U. S., 366.

We would also call the court's special attention in this connection to our contention made in our main brief that the record of semi-annual statements was not the only public record referred to in the act under which these bonds were issued. The court does not refer to this contention of ours at all in its opinion, except to say, upon page 5, that except for the provision contained in section 30 of this act, etc., the county would not be estopped from finding these various facts. In our former brief we called the court's attention to the fact that there were four records provided by the identical act under which these bonds were issued showing the amount of county indebtedness: First, the register of county warrants; second, the bond register; third, the semi-annual statements, and, fourth, the order
188 made by the county commissioners specifying the amount of debt to be created. This court in the case of Rollins vs. Gunnison County has specifically referred to the last of these provisions as being a record of which purchasers will be required to take notice. We cannot conceive why these other records are not of equal importance. They are required by prior provisions of the

same act, provisions of equal force and effect as that relating to semi-annual statements, and why they are not notice to purchasers of bonds just as much as this sacred section 30 we are unable to comprehend. We refer the court to our former brief, pages 30 to 42, where the statutes are set forth at length and this matter is discussed.

IV.

The Effect of this Being a Debt by Loan.

There seems to be no question in the minds of the court but that this was a debt by loan. In this connection we desire to call attention to the date when it was created. The court says some time after September 6, 1880. The sworn complaint filed by the plaintiff alleges that the debt was contracted and the bonds were issued on July 31, 1880. The proof shows that on March 17, 1880, \$11,000 of the bonds were issued to Walter H. Jones and the money paid into the treasury of the county. (Transcript of the Record, p. 91.) On August 3, 1880, Mr. Roberts bid for the balance of the bonds, was accepted and they were sold to him. (Transcript of the Record, p. 103.) Then on page 104 of the record commences a resolution of the board which shows that the bonds already issued were called in and new ones given in their place with some change in the phraseology. We do not understand that the substitution of a new bond for an old one is the creation of a new debt; in fact, the supreme court of this State in the case of *Standley vs. Lake* 189 County, recently decided, has held that it is not the creation of a new debt, and such is the decision of the Supreme Court of the United States.

Doon Twp. vs. Cummins, 142 U. S., 366.

The debt in this instance was created when the bids for the bonds were accepted and they were ordered issued. The cancellation of the first issue and the substitution of new bonds in their place would not be the creation of a new debt. If the bonds were issued upon the assessment of 1879, they showed upon their face that they were issued in excess of the constitutional limit. Under the assessment-roll of 1879 the limit of indebtedness of the county for all purposes would be \$40,000, or slightly under, so that the purchaser by looking at the assessment-roll and the face of the bonds would be put upon notice. The same rule applies if this is a debt by loan to its creation in any one year. As this is a matter which seems to have been debated between the members of the court and upon which they have divided in opinion, we do not know that any further discussion upon our part will further enlighten any member of the court. We recognize the fact that the language of Mr. Justice Lamar in the *Rollins* case, and of our supreme court in the *May* case, were, perhaps, not necessary for a decision of the particular point before the court, but we believe that where the supreme court of a State has construed its own constitution in a certain way, and the Supreme Court of the United States has expressly approved such construction, and where the language of the constitution itself is so clear that

there can be but one reading of it, that these constructions should be binding upon other courts. This becomes the more obvious when it is considered that our supreme court has construed the same provision in the same way pending this case in the trial court. The supreme court of Colorado has placed this identical construction upon the constitution of the State.

In re Contracting State Debt, 21 Colo., 399.

V.

Violation of Constitutional Proviso a Mere Irregularity.

If we correctly apprehend the effect of that part of the opinion relating to an overissue of the bonded indebtedness for the year 1879, it is, that if a constitution, although prohibiting the creation of a debt by loan for one year beyond a certain sum, yet permits a total debt by loan beyond that sum, the officials empowered to contract the obligation may, notwithstanding the yearly limitation, create the entire liability in any one year, their misconduct being at best a mere irregularity. In other words, the deliberate disregard of a constitutional inhibition by the county commissioners of Lake county was of no consequence to the tax-payers, who could in any event have been charged with the obligation if it had been strung out over a series of years, instead of appearing as a single transaction. The consequences of such a declaration are difficult to determine; for if that part of section 6 of article 11 which limits the amount of indebtedness which a county can contract in any one year is merely directory, it ought to follow, and must logically follow, that every other limitation provided by that section is directory also, for the language of the section is unequivocally prohibitory: "Such indebtedness contracted in any one year shall *not* exceed the rates upon taxable property in such county," etc. If this is not prohibitive, how can these words, "The aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above herein limited," etc., be prohibitive?

In other words, if a limitation upon power to contract debt in any one year is binding upon nobody, the limitation upon the general power to contract indebtedness must be equally meaningless.

Suppose that the commissioners of Lake county had caused an election to be held upon a resolution declaring the sum of \$100,000 necessary for public improvements, and at an election held in '79 the tax-payers voted for the indebtedness. Suppose, also, this sum in bonds had been issued and issued in one year. Might not this court with equal propriety say, first, that the issuance of these bonds in the same year was a mere irregularity, and that the total issue beyond the constitutional power of the commissioners to create debts for any purposes was also an irregularity?

Our investigation of the authorities, since receiving the court's opinion, has been fairly thorough, and we have been unable to find any decision which warrants this finding. The people of the State,

in framing and adopting their constitution, wisely attempted to restrict the power of certain officials in contracting public obligations. So far as language could do it, they made themselves clearly understood. The necessity for such a limitation was made apparent during the infancy of the Commonwealth by the conduct of certain of its municipal subdivisions. Many of the county boards in the State evinced a disposition to discriminate between what were called obligations voluntary and obligations involuntary; the latter were said to be those necessarily incurred in the discharge of public duties,

192 in the enforcement of the laws and in the transaction of public business. These were said to be above and beyond the constitution; and the door thus opened became a portal for the entry of fraud and wrong, in all its varied forms. Controversies soon arose, and were finally crystallized in the case of the People at the relation of Rollins against May, quoted in our original brief. From that time on, with the exception of a decision of his honor, Judge Brewer, in the circuit court of the United States, down to the pronouncement of this opinion, section 6 of article 11 of the constitution has been declared to be an absolute barrier between an honest and capable administration of county affairs and their bankruptcy. The announcement by this court that one of its prohibitions is of no importance, and merely directory, we fear will prove the entering wedge into this line of decisions, and may be followed by similar ones relating to other portions of the section.

The court virtually holds that it is the statute, and not the constitution, which gave to the commissioners of Lake county the power to issue the bonds in suit. The constitution is said to be restrictive merely, and to be permissive in no sense, while the law enacted by the legislature under its provisions is the source to which the commissioners must have looked for authority to act in the premises. We may, for the purposes of the argument, accept this statement as absolutely sound; nevertheless, we find in the law itself a restriction upon the action of the board as stringent and unmistakable as any presented by the constitutional section under consideration. This law was printed upon the back of every bond, and informed all purchasers of its provisions, yet the law giving authority to contract the debt, as well as the constitution, restrictive only in its character, forbade the issuance of \$50,000 in 1879, or in 1880

193 prior to September of that year, that being the date upon which the assessed values for 1880 became effective.

The Commissioners of Lake County *vs.* Stanley, sup. court Colo., Jan., 1879.

Ever since Lake County *vs.* Rollins, and Lake County *vs.* Graham were decided by the Supreme Court of the United States, it has been the admitted law that holders of bonds were bound to take notice of the assessed valuation of counties. This notice, coupled with the prohibitory requirements of both law and constitution, was a conclusive warning to every holder of every bond of the \$50,000 issue that such issue was void, by reason of excess. If the practical operation of this decision is not to change the rule declared and adopted

by the Supreme Court of the United States in similar cases, then we are wholly mistaken in the interpretation which we have given to the court's opinion.

To show the condition of Lake county when these bonds were issued and the manner in which its obligations have been heaped up from year to year we call attention to pages 10 to 22 of the brief in support of the petition for rehearing filed in the case of The Board of County Commissioners of Lake County vs. Platt, No. 803 on the docket of this court. The court will also find in that brief a clear discussion of some other phases of the constitutional questions here involved.

We are aware that to some extent, at least, it is the policy of this court to decline petitions for rehearing. Nevertheless, a rule of the court authorizes their making, and surely it must have been intended to subserve some needed purpose, or provision would not have been so made therefor. Some rules and practices are more honored in the breach than in the observance, and we earnestly ask this court to carefully consider before denying the request which we here make for a rehearing, reargument and redecision of this all-important controversy.

Respectfully submitted.

GEORGE R. ELDER,
THOMAS, BRYANT & LEE,
Attorneys for Defendant in Error.

Attorneys for defendant in error hereby certify that in their opinion the foregoing petition for rehearing is well taken and that the points therein presented are substantial and meritorious.

GEO. R. ELDER,
THOMAS, BRYANT & LEE,
Attorneys for Defendant in Error.

Endorsed: Filed May 31, 1897. John D. Jordan, clerk.

195 (Order Denying Petition for Rehearing.)

And on the seventh day of June, A. D. 1897, in the record of the proceedings of said circuit court of appeals is an order denying the petition of defendant in error for a rehearing in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term,
1897.

MONDAY, June 7, 1897.

HARRY H. DUDLEY, Plaintiff in Error,	} No. 821.
<i>vs.</i>	
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY of Lake, Colorado, Defendant in Error.	

In error to the circuit court of the United States for the district of
Colorado.

This cause came on this day to be heard upon the petition for a rehearing filed by counsel for the defendant in error and the brief filed in support thereof.

On consideration whereof it is now here ordered by this court that said petition for a rehearing of this cause be, and the same is hereby, denied.

June 7, 1897.

(Motion for Stay of Mandate.)

And on the fourteenth day of June, A. D. 1897, a motion of defendant in error for stay of mandate was filed in said cause in the words and figures following:

UNITED STATES OF AMERICA,	} ss :
District of Colorado,	

In the Circuit Court.

196	HARRY H. DUDLEY, Plaintiff in Error,	}
	<i>vs.</i>	
	THE BOARD OF COUNTY COMMISSIONERS OF GUNNISON COUNTY, Defendant in Error.	

Comes now the defendant in error in the above entitled cause and respectfully petitions the court to enter an order staying the mandate in said cause until the defendant in error has time to present an application to the Supreme Court of the United States for a writ of certiorari, and as the Supreme Court of the United States has adjourned until the October term the defendant in error respectfully petitions a stay upon the mandate until the 15th day of November, A. D. 1897, and said defendant in error respectfully shows that the opinion in this case was rendered by a divided court, and is based entirely upon the decisions of the Supreme Court of the United States construing the constitutional provisions of the State of Colorado, and the case is one which should be reviewed by the Supreme Court of the United States, if that court will take jurisdiction.

Said defendant in error further shows that nothing can be gained by issuing the mandate at the present time, for the reason that it will necessitate another trial of the case in the United States circuit court for the district of Colorado, and at the present time the situation of that court, as is well known to this honorable court, is that,

owing to the failure of Congress to appropriate money for the purpose of paying jurors, said court has no jury, and there will be no jury until the new appropriation bill for the fiscal year beginning July 1st, 1897, becomes effective, and the circuit court has announced that there will be no jury trials until the November term of said court, the only jury to be called being one in the district court for the trial of criminal cases, so that no injury or harm will be done to the plaintiff in error or any one else by withholding the mandate in said cause until the 15th day of November, 1897.

THOMAS, BRYANT & LEE,

Attorneys for Def't in Error.

197 Endorsed: In the circuit court of appeals. Harry H. Dudley *vs.* The Board of County Commissioners of Gunnison County. Motion def't in error for order staying mandate. Filed Jun- 14, 1897. John D. Jordan, clerk. Thomas, Bryant & Lee, attorneys for def't.

(Order Staying Mandate.)

And on the fourteenth day of June, A. D. 1897, in the record of the proceedings of said circuit court of appeals is an order staying the mandate until October 26, 1897, in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1897.

MONDAY, June 14, 1897.

HARRY H. DUDLEY, Plaintiff in Error,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY } No. 821.
of Lake, Colorado, Defendant in Error.

In error to the circuit court of the United States for the district of Colorado.

This cause came on this day to be heard upon the motion filed by counsel for defendant in error for an order staying the issuance of the mandate in said cause until 26th day of October, 1897, for the purpose of presenting an application to the Supreme Court of the United States for the allowance of a writ of certiorari.

On consideration whereof, it is now here ordered by this court that said motion be, and the same is hereby, granted, and that the mandate in said cause be, and the same is hereby, stayed until the 26th day of October, A. D. 1897.

June 14, 1897.

198 *(Objections of Plaintiff in Error to Application for Stay of Mandate.)*

And on the eighteenth day of June, A. D. 1897, the objections of the plaintiff in error to the application of the defendant in error for

a stay of mandate was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following :

In the United States Circuit Court of Appeals.

HARRY H. DUDLEY, Plaintiff in Error,

vs.

BOARD OF COUNTY COMMISSIONERS OF LAKE COUNTY, Defendant
in Error.

Objections of plaintiff in error to motion of defendant in error to stay mandate in said cause.

First. After reversal of the judgment in the lower court and the overruling of the petition for rehearing, we know of no authority or precedent by which this court can maintain the cause in this court. The successful party is entitled to have the mandate of this court issue at once.

Second. There is nothing suggested in the motion setting forth any real ground for the Supreme Court issuing a certiorari. The motion states that the decision of this court is "based entirely upon the decisions of the Supreme Court of the United States construing the constitutional provisions of the State of Colorado, and that the case is one which should be reviewed by the Supreme Court of the United States, if that court will take jurisdiction."

It is not even suggested that there is want of uniformity between the decision of this court and the decisions of the Supreme Court of the United States, on which the decision of this court was based. The motion fails to give even color of a supposition that the Supreme Court would issue a certiorari.

Third. Congress made the appropriation nearly two weeks ago for the cost of a jury, which has been called to sit in the Federal court during the month of July, and the jury will actually be in attendance at that time.

Fourth. The jurisdiction of the court of appeals in a case of this kind is final.

199 Fifth. The plaintiff in error expects to be ready and desires to have a trial of this case at the July term of the circuit court.

Respectfully submitted that the motion to stay the mandate should be denied.

J. E. McKEIGHAN,

For Plff in Error.

Endorsed : No. 821. In the United States circuit court of appeals. Harry H. Dudley *vs.* Board of County Commissioners of Lake County. Objections of plaintiff in error to motion of defendant in error to stay mandate in said cause. Filed Jun-18, 1897. John D. Jordan, clerk.

200 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing 199

pages contain a true copy of the portions of the transcript of the record upon which the cause was heard in the United States circuit court of appeals, and full, true, and complete copies of the proceedings and record entries, including the opinion of said circuit court of appeals, in the case of Harry H. Dudley, plaintiff in error, vs. The Board of County Commissioners of the County of Lake, Colorado, defendant in error, No. 821, December term, 1896, as the same remain on file and of record in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this tenth day of August, A. D. 1897.

JOHN D. JORDAN,

*Clerk of the United States Circuit Court of Appeals
for the Eighth Circuit.*

201 UNITED STATES OF AMERICA, ss :

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

HARRY H. DUDLEY, Plaintiff in Error,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF LAKE COUNTY,
Colorado, Defendant in Error.

Error to the circuit court of the United States for the district of Colorado.

The Supreme Court of the United States, upon the application of the above-named defendant in error, having granted a writ of certiorari to the judges of the United States circuit court of appeals for the eighth circuit, by which said court is commanded to send without delay to the said Supreme Court the record and proceedings in said cause, and a certified transcript of said record and proceedings having already been filed in the office of said clerk of said court, upon which said application for writ of certiorari was made, now, therefore, it is hereby stipulated and agreed that the said certified transcript now on file as aforesaid may and the same is hereby to be taken as return to the said writ, and that no other or further certified transcript of the record for that purpose shall be required.

Dated at Denver, in the State of Colorado and circuit aforesaid, this — day of October, A. D. 1897.

DAN'L E. PARKS,

H. B. JOHNSON,

EDMUND F. RICHARDSON,

Attorneys for Plt'f in Error.

GEO. R. ELDER,

C. S. THOMAS,

W. H. BRYANT,

H. H. LEE,

Att'ys for Def't in Error.

Endorsed: United States c't court of appeals, eighth judicial circuit. Harry H. Dudley vs. Board County Commissioners Lake County. Stipulation as to return to writ of certiorari. Filed Oct. 27, 1897. John D. Jordan, clerk.

202 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals, eighth circuit, do hereby certify that the foregoing page contains a true copy of the stipulation as to return to writ of certiorari from the Supreme Court of the United States in the case of Harry H. Dudley plaintiff in error, vs. The Board of Commissioners of Lake County, Colorado, No. 821, May term, 1897, as the same remains upon the files and records of said United States circuit court of appeals.

Seal United States Circuit
Court of Appeals, Eighth
Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this 29th day — October, A. D. 1897.

JOHN D. JORDAN,
*Clerk of the United States Circuit Court of
Appeals, Eighth Circuit.*

203 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Being informed that there is now pending before you a suit in which Harry H. Dudley is plaintiff in error and The Board of County Commissioners of the County of Lake, Colorado, is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Colorado, and we being willing for certain reasons that the said cause and the record and proceedings therein

should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of October, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

205 [Endorsed:] Case No. 16,687. Supreme Court of the United States. No. 474, October term, 1897. The Board of County Comm'rs of Lake Co., Col., vs. Harry H. Dudley. Writ of certiorari and return. Filed Oct. 27, 1897. John D. Jordan, clerk. Office Supreme Court U. S. Filed Nov. 1, 1897. James H. McKenney, clerk.

Return to Writ of Certiorari.

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, in obedience to the command of the within writ and in pursuance of the stipulation of the parties, a true copy of the original of which is hereto attached, do hereby certify that the transcript of record furnished with the application for a writ of certiorari to the Supreme Court of the United States in the within-named cause contains a full, true, and complete transcript of the record and all things concerning the same, as full, true, and complete as the originals of the same now remain on file and of record in my office.

Seal United States Circuit Court of Appeals,
Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of St. Louis, Missouri, this twenty-ninth day of October, A. D. 1897.

JOHN D. JORDAN,

Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Endorsed on cover: Case No. 16,687. U. S. C. C. of appeals, 8th circuit. Term No., 177. The Board of County Commissioners of the County of Lake, State of Colorado, petitioner, vs. Harry H. Dudley. Filed October 11, 1897.

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JAMES H. McKENNEY
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IN

The Supreme Court

OF THE

UNITED STATES.

October Term, A. D. 1897.

**THE BOARD OF COUNTY COMMISSION-
ERS OF THE COUNTY OF LAKE AND
STATE OF COLORADO,**

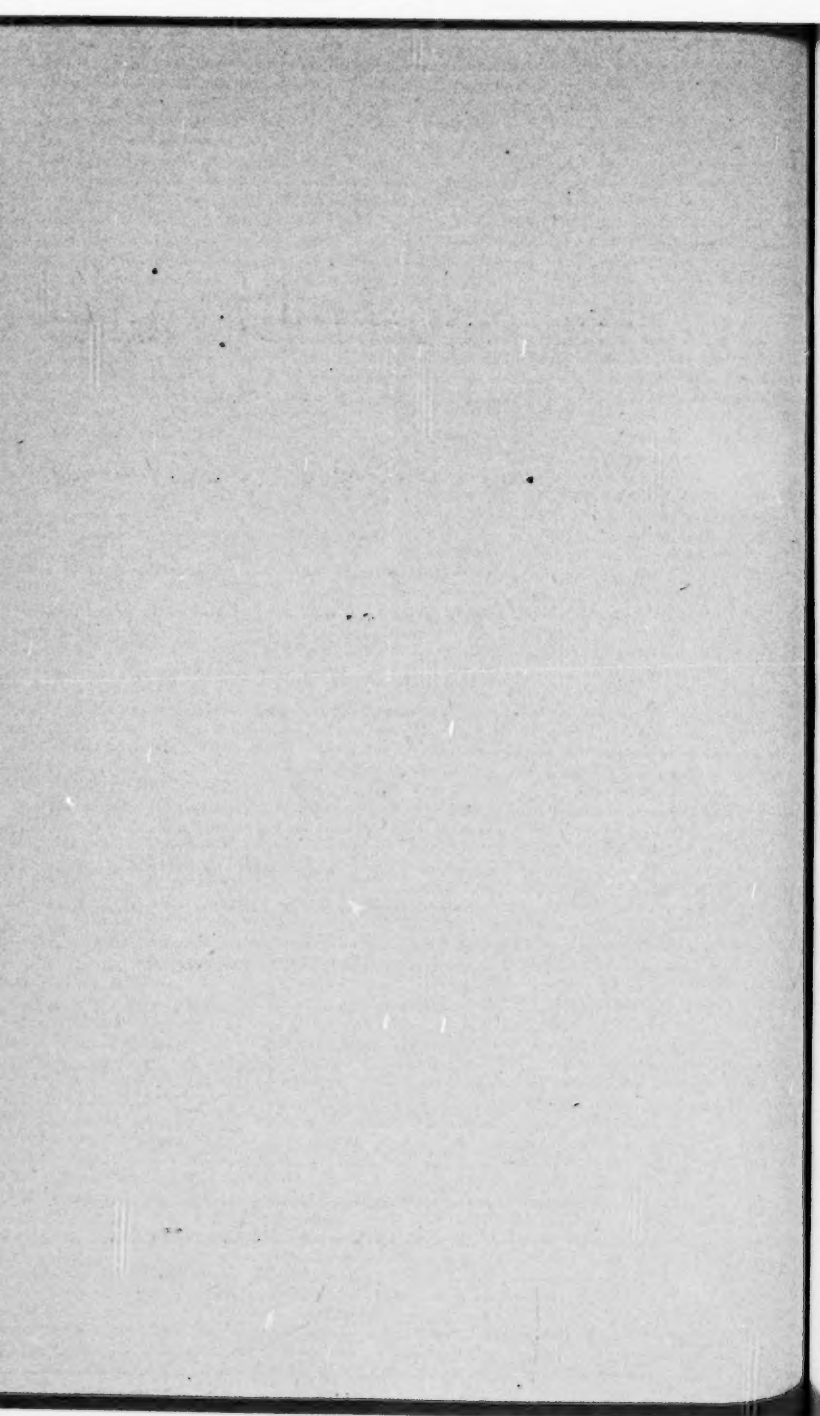
Petitioner,

vs.

HARRY H. DUDLEY,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
U. S. CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.**



IN THE SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1897.

To the Honorable Supreme Court of the United States, and the Judges thereof.

Comes now the Board of County Commissioners of the County of Lake and State of Colorado, and petition this honorable Court for a writ of *certiorari* to the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause therein lately depending, entitled Harry H. Dudley, plaintiff in error, vs. The Board of County Commissioners of the County of Lake and State of Colorado, defendant in error, and in which said cause a decision was by the said Court heretofore, and at the December term, A. D. 1896, thereof, duly entered, reversing the judgment of the Circuit Court of the United States for the Eighth Judicial Circuit, in and for the State and District of Colorado theretofore rendered in said cause, all of which more fully appears in the record of the proceedings in said cause, in said United States Circuit Court of Appeals.

II.

That this application is made under the terms and provisions of Section 6 of the act of Congress of March 3, 1891, and entitled an act to establish

a Circuit Court of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes.

III.

That the plaintiff in error filed its complaint in said cause in the Circuit Court of the United States for the District of Colorado on, to wit, the 31st day of March, A. D. 1892, and in and by said complaint he declared that he was a citizen and resident of the State of New Hampshire, and that your petitioner, as defendant, was a corporation organized under the laws of the State of Colorado, and was authorized to create indebtedness for the purpose of erecting necessary public buildings, after having submitted at a general election the question of incurring such debt to the legal qualified electors of said county who had paid a tax on the property assessed to them therein for the preceding year; that the defendant in due time, form and manner submitted the question of incurring the debt evidenced by the bonds and coupons thereafter mentioned at the general election, legally called and duly held in said county on the 7th day of October, 1879, and that the majority of all the legal ballots then cast were in favor of such indebtedness; whereupon, the defendant, on the 31st day of July, 1880, caused to be made certain bonds, a copy whereof was set forth in said complaint, as being one of a series of \$50,000, which the Board of Commissioners of said county had issued for the purpose of erecting necessary public buildings, by virtue of and in compliance with

a vote of a majority of the qualified voters of said county at said election, and under and by virtue of and in compliance with an act of the General Assembly of the State of Colorado, approved March 24, 1877, it being thereby certified that all the provisions of said act had been fully complied with by the proper officers in the issuing of said bonds. That said complaint further alleged that to each of said bonds were attached coupons for annual interest accruing thereon, payable on the 1st of April of each year during the life of such bonds; that on July 31, 1880, the defendant, your petitioner, made, executed, sold and delivered said \$50,000 in bonds to sundry *bona fide* purchasers thereof, they having been duly signed by the proper officers and attested by the seal of said county, and the coupons to the said bonds having been also duly executed; that the County of Lake from July 31, 1880, until April 1, 1884, paid the interest on said bonds in accordance with the terms thereof and of the coupons thereto attached, but afterwards made default upon the payment of all coupons maturing between said 1st day of April, 1884, and the commencement of said suit; that plaintiff is the owner and holder of coupons numbered 4, 5, 6, 7, 8, 9, 10 and 11 of said bonds, the principal of said matured coupons then being \$26,500; and the plaintiff avers that he became a purchaser of said coupons before the suit for a valuable consideration paid by him, and without notice of any claim at law or in equity affecting their value.

IV.

Your petitioners further declare that afterwards and on, to wit, the 13th day of June, 1892, it filed its answer to the said complaint in and by which it put all of the matters and things in said complaint at issue by proper denials, except its municipal character, its payment of interest upon said bonds until the 1st day of April, 1884, and its refusal to pay thereafter. That the defendant, further answering, alleged that the limitation of the aggregate amount of indebtedness which could lawfully be contracted by it or be an outstanding liability against said county on or before October 7, 1879, had then been reached and exceeded before the pretended debt of \$50,000, evidenced by the bonds mentioned in said complaint, and the interest thereon was submitted to or voted upon by the voters of said county qualified to vote thereon. And as a further answer and defense your petitioners therein alleged that notwithstanding the said question of the contraction of said indebtedness was submitted to the qualified voters of said county on October 7, 1879, yet none of said bonds were issued, or authorized to be issued, prior to July 31, 1880, that being the date expressed in said bonds, and that the assessed valuation of the property in Lake County, in and for the year 1880, was \$11,126,489, and the aggregate amount of the indebtedness of said county, contracted or incurred prior to July 31, 1880, and on said date existing and outstanding, was \$235,801.39. That in the year 1880 the aggregate amount of debt or liability

which the county might lawfully contract or incur or permit to be outstanding by submitting the question thereof to the voters of said county, or in any other manner, or for any other purpose whatsoever, was limited by Section 6, Article X. of the Constitution of the State of Colorado to not more than \$66,758.93, which limit had long before and on the said 31st day of July, 1880, been reached, exceeded and passed, and been so reached, exceeded and passed before said bonds or coupons were executed, transferred or delivered; wherefore your petitioners alleged the said bonds and each of them and the coupons thereon to be null and void. And your petitioner, for further answer, alleged that the said bonds were actually delivered and assigned on or about November 15, 1880, as of July 31, 1880, at which time the indebtedness of the County of Lake, then incurred and outstanding greatly exceeded the amount to which, by the Constitution of the said State, said indebtedness was limited. And your petitioner further alleged in said answer that the coupons complained of and numbered 4 and 5 and aggregating \$2,600, presented causes of action, if any, which accrued against the defendant more than six years prior to the commencement of said action, and were, therefore, barred by the statute of limitations. And your petitioner, further answering, alleged as to the said coupons forming the subject of said action, and alleged to have been attached to the said bonds, and representing the amount of annual interest due and payable thereon, that they were in themselves evidences of no part of said assumed or pre-

tended indebtedness, but only represented interest on the principal thereof, and no part or portion of the principal itself. And your petitioner, for a further and additional defense, alleged in said answer that by Sec. 448 of the General Laws of the State of Colorado of 1887, then in force, it is provided that the submission of the question of incurring an indebtedness for the erection of public buildings, etc., to a vote of the people shall not be made or had, if, at the time thereof, the aggregate amount of the indebtedness of the county, exclusive of debts contracted prior to July 1, 1876, in counties in which the assessed valuation of property should be less than five millions and more than one million dollars, should equal twelve dollars on each thousand dollars thereof, and that at the time of the proposed submission of said question of indebtedness to the said voters of said County of Lake, and at the time of said election on October 7, 1879, the assessed valuation of the property of Lake County was \$3,485,628, and at said time the aggregate amount of indebtedness of the said county, exclusive of any and all debts contracted prior to July 1, 1876, was more than twelve dollars on each thousand dollars of said valuation, by reason whereof the action of the said Commissioners in submitting said question of the creation of said indebtedness to the vote of said qualified electors, and the action of the said electors in voting thereon, and the action of the Commissioners in issuing bonds upon such vote, were and each of them was null and void.

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V.

That afterwards and on or about the 2d day of December, 1893, the plaintiff caused to be filed a replication to the said answer, denying each and every allegation therein contained.

VI.

That afterwards and to wit, on the 7th day of January, A. D. 1896, the same being one of the days of the regular November term, A. D. 1896, of said Court, the said cause came on to be heard before the said United States Circuit Court for the District of Colorado, and a jury therein impaneled, whereupon the said jurors, having heard the evidence produced therein, and the instructions of the Court, found the issues therein joined for the defendant, whereupon it was considered by the Court that the defendant, your petitioner, go hence hereof without day, and have and recover from the said plaintiff its costs to be taxed, and have execution therefor.

VII.

That thereafter such proceedings were had in said cause by the said plaintiff, that a writ of error issued from the Circuit Court of Appeals for the Eighth Judicial Circuit to the said Circuit Court of the United States for the District of Colorado, by reason whereof the record of said cause was certified to said Court, and the same came on for hearing upon errors assigned to the record therein by the said plaintiff in error, and afterwards

and at the December term, A. D. 1896, of said Court, the same was duly submitted to the consideration of the said honorable Court.

VIII.

That afterwards and during said term, and to wit, on the 12th day of April, A. D. 1897, the said Court, by its judgment, reversed the judgment of the said United States Circuit Court for the said District of Colorado, and remanded the said cause for a new trial, one of the Judges of said honorable Court, to wit, the Hon. Amos M. Thayer, then and there dissenting. And thereby your petitioner declares that the said judgment theretofore by it obtained in said Circuit Court of the United States for the District of Colorado was set aside and for naught held.

IX.

Your petitioner further alleges that at the trial of said cause, before the said Circuit Court of the United States for the District of Colorado, it appeared and appears, from the evidence, that in the year 1879 the assessed valuation of the County of Lake was \$3,485,628, and for the succeeding year \$11,126,489; that the indebtedness of said county, as represented by outstanding warrants on June 30, 1879, was \$33,432.98; on October 7, 1879, \$58,382.46; December 31, 1879, \$86,146.86; June 30, 1880, \$209,897.55; and December 31, 1880, \$362,683.23; and that the amounts between these dates regularly increased. It also appears that the extreme constitutional limit of indebtedness

which the county could reach was at all these times less than the amount of the debt actually incurred, so that at the time the bonds in controversy were voted, and when they were issued, the floating indebtedness of the county had already passed beyond the constitutional limit. It also appeared that the bonds from which the coupons were detached had been issued to or purchased by one E. W. Rollins, who at the time informed himself of existing conditions, and who upon such information, personally acquired, believed them to be valid. It also appeared that the bonds and coupons in suit were assigned or attempted to be assigned to the plaintiff by the owners thereof, by bills of sale and assignments executed in 1884-5, but that the defendant was ignorant of the fact, and never saw the bills of sale or assignments until December, 1894. It also appears that he never had, and, with one possible exception, never saw the bonds or the coupons, never had them in his custody for a moment, never paid any consideration whatever for them, never incurred any liability concerning them, and expected, in the event of success, to pay over the proceeds, less the expense of litigation, to the owners thereof. It also appeared that a record of the indebtedness of said county was kept, under the provisions of the act concerning counties, under which the bonded indebtedness was incurred. This record consisted, first, of a semi-annual statement, recorded in a book kept for that purpose; second, of a warrant registry, and, third, of a bond register—all of them being public documents, subject at all times to

public inspection and containing statements, which the law enjoined upon the public officials to make. There was no attempt upon the part of the plaintiff to show that a single individual or corporation ever owning the bonds was a *bona fide* holder, without notice of the facts above stated, nor was any excuse or explanation offered for the remarkable transfer or pretended transfer of the bonds and coupons from the real owners thereof to the plaintiff. Under these circumstances and conditions, the honorable Judge of the Circuit Court of the United States for the District of Colorado directed a verdict for the defendant, in doing which the said Court of Appeals has determined that error was committed, and reversed the judgment accordingly.

X.

Your petitioner further represents that the said action grows out of and depends upon a construction of Section 6, Article XI. of the Constitution of Colorado, which declares that "No county shall contract any debt by loan in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges, and such indebtedness, contracted in any one year, shall not exceed the rates upon the taxable property in such county following, to wit: Counties in which the assessed valuation of the taxable property shall exceed \$5,000,000, \$1.50 on each thousand thereof; counties in which such valuation shall be less than \$5,000,000, \$3 on each \$1,000 thereof, and the aggregate amount of in-

debtedness of any county, for all purposes exclusive of debts contracted before the adoption of this Constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of increasing such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt, but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not exceed twice the rate upon the valuation last herein mentioned: Provided, that this section shall not apply to counties having a valuation of less than \$1,000,000." And your petitioner further represents that said action grows out of the provisions of certain sections of an act of the State of Colorado, entitled an act concerning counties, county officers and county governments, and repealing laws on those subjects, approved March 24, 1877.

XI.

Your petitioner further alleges that in the statement accompanying the opinion of the said United States Circuit Court of Appeals in said cause, and prepared by the said Court, it is, among other things, declared that "the bonds have since within one year of their issue been held and owned by purchasers for full value, without actual notice of

any illegality or infirmity in said bonds," although your petitioner alleges that there is nothing in the record of said cause which sustains the said declaration, directly or indirectly; that the said statement also contains the following: "There was no evidence in the case that any such semi-annual statement made by the Board of County Commissioners for said County of Lake, at the January or July sessions of said Board in the year 1880, had ever been entered of record in any book kept for that purpose only, as required by said act, and that the fair inference of said testimony is that no such record was ever made."

And your petitioner respectfully avers that the testimony contained in the record relative to the making and recording of such statements does not warrant the inference or statement thus made, but, on the contrary, establishes *prima facie* the making and record of said statements as required by law.

Your petitioner, therefore, respectfully complains that great and manifest error appears in said decision as to each and every proposition by it announced, as hereinafter recited, and as appears therein, and it alleges for such errors the following:

1. The misconception by said honorable Court of the facts heretofore recited from the statement accompanying the said opinion forms the basis thereof, and without such misconception or misstatement of said facts the said opinion can not be supported; for if, as your petitioner contends, there is no evidence whatever in said record of the ownership of said bonds and coupons for

full or any value, without actual notice of their illegality or infirmity, or if, as a fact, it appears *prima facie* that the records of the indebtedness of said county were kept as required by law and open to the public inspection, the plaintiff had no right to recover, unless, independent of such facts, it should appear that the county was not indebted to the extent of the constitutional limitation, or that its assessed valuation was not as proven by your petitioner at the trial.

2. The said honorable Court of Appeals erred in the statement of its first proposition in said decision, to wit: "That plaintiff, by the delivery to him of the coupons and written assignments thereof, became the legal owner of such coupons and entitled to maintain an action upon them, whether he had actually paid the former owners any consideration for them or not. Holding them by valid written transfers from former *bona fide* holders for value, he succeeded to all rights of such former holders. No defense is pleaded which makes it material whether the plaintiff, under such circumstances, did or did not pay value for the coupons."

Your petitioner reiterates that no evidence of *bona fide* ownership of said bonds by any of the owners thereof was introduced; that it does appear from said record that the plaintiff does not hold said bonds by valid or other written transfers from any persons, or that he ever held them or owned them at all. The decision of the said Court is erroneous, not only for the reasons aforesaid, but because the same is at variance and in

conflict with the opinion of this honorable Court in *Lytle vs. Lansing*, 147 U. S., 59, and establishes a rule of procedure concerning parties for said Court which is not recognized or approved by this honorable Court or justified by the laws of the United States.

The defense pleaded by your petitioner directly puts in issue the *bona fides* of the plaintiff's ownership. He alleges that "he became the purchaser of said coupons before this action, for a valuable consideration paid by him, and without notice of any claim at law or in equity affecting their validity."

The defendant, your petitioner, answering thereto, says that, as to this allegation, "it has not and cannot obtain sufficient knowledge or information upon which to base a belief." This form of denial is authorized by the Colorado Code of Procedure, Section 56, as to all allegations not presumably within the knowledge of the defendant, and puts such an allegation directly in issue.

3. The said honorable Court erred in the second subdivision of its said opinion, because in considering Section 6 of Article XI. of the Constitution of Colorado it declares that, "under the act of March 24, 1877, of the General Assembly of Colorado, there was necessarily intrusted to the Board of County Commissioners the power and duty of determining whether the proposition to create an indebtedness was carried at the election, and the ascertainment of the fact that the aggregate amount of all forms of county indebted-

ness was within such amount that it would not by the issue of the bonds be made to overpass the prescribed limitation; hence, except for the provision contained in Section 30 of the same act, requiring the Board to make and publish the semi-annual statements of indebtedness and financial condition of the county, and requiring the Clerk of the Board to record such statements in a book to be kept for that purpose only and to be open to public inspection, the recitals in the bonds above quoted would be conclusive, and would estop the county in a suit by a *bona fide* holder of the bonds or coupons.

Your petitioner respectfully submits that this determination overrides the constitutional provision involved, makes its limitations secondary to an act of the Legislature passed thereunder, and wholly disregards the construction given heretofore to the said section of the Constitution by this honorable Court in the various cases which have by it been decided and involving such construction; it also sustains and confirms the power of the Board of County Commissioners to determine and decide the amount of the indebtedness of the county notwithstanding such indebtedness is made matter of record, and constitutes a fact wholly independent of such determination. It also overlooks or disregards that provision of the constitutional section above quoted, which makes the record of assessed valuations binding and conclusive upon all bondholders, *bona fide* or otherwise, and which, together with any bond of the series, would indicate by a mathematical calculation the

extent of the indebtedness which could by the County of Lake be incurred.

4. The said honorable Court erred in its conception and construction of the decision of this honorable Court in the case of Sutliff against Lake County, 147 U. S., 230, and in the application of the doctrine of that decision to this case. The said honorable Court, in its opinion, declares that "In the Sutliff case it was held that as Section 30 of the same act, under which the bonds were issued, made it the duty of the Board of County Commissioners to make out and publish semi-annual statements showing the indebtedness, if any, of the county, and that such statements should be entered of record by the Clerk of the Board in a book to be by him kept for that purpose only, and to be open to the inspection of the public, a person about to purchase bonds was charged with the duty of examining this public record provided for by the very act under which the bonds were issued, and from that inform himself whether the amount of the issue stated in the bonds increased the aggregate indebtedness of the county beyond the constitutional limitation; and that because of such public record of such statements, the county was not estopped to prove that before such bonds were issued the indebtedness of the county had passed the constitutional and statutory limits." Your petitioner contends that the duty here admitted to be upon the bond purchaser to examine such record was never performed, but, nevertheless, the said Court of Ap-

peals declares that your petitioner is liable upon said coupons.

Your petitioner respectfully submits that it was also determined in said Sutliff case that the record of assessed valuation was a record of which purchasers were equally bound to take notice, and that if it appeared from the bond and the record of assessed valuation, or from the bond and the record of such valuation, together with the amount of debt as shown by the semi-annual statement, that the limit of indebtedness had been reached, the bondholder could not recover.

Your petitioner respectfully submits that from the record it appears that a holder of any one or more of said bonds, by comparing the same with the record of assessed valuation, independent of any other record, could, by a mathematical calculation, at once discover the void character of said bonds, but that said requirement is wholly eliminated from consideration by the opinion of said honorable Court.

5. The said honorable Court further committed error in the second subdivision of its said opinion in the following statement:

"In this case it is clearly shown that there never was any such semi-annual statements or record thereof, covering any of the time which could affect the legality of these bonds."

Upon this assumption, the case seems to have been determined against your petitioner—first, because of said assumption; second, because the requirements of the Constitution and the laws concerning the record of assessments were entirely

ignored or disregarded, and third, because the said honorable Court assumed that inasmuch as said semi-annual statements were not kept or recorded, *there was no other record* required to be kept by law as a notice binding upon *bona fide* holders.

Your petitioner respectfully submits that it is clearly shown by the record that such semi-annual statements or some of them were kept, and that other records required to be kept by the same law were equally available to the purchasers and by which it is contended he was equally bound.

6. Your petitioner further respectfully submits that the said honorable Court of Appeals erred in that part of the second division of its opinion which reads as follows:

“As there was no such record in existence as the act required and contemplated, there was no record which the purchaser of these bonds was bound to examine, or which would be constructive notice to him of the aggregate indebtedness of the county when the bonds were issued. Such purchaser was, therefore, entitled to rely on the recitals in the bonds, and as one of the recitals was a certificate that all the provisions of the act had been fully complied with by the proper officers in the issuing of the bonds, and as a provision of that act, limiting the issue of the bonds by the aggregate of all the county indebtedness, was, in effect, identical with the constitutional provision on the same subject, the recital was equivalent to a certificate that this provision of the Constitution had

been complied with, and brings the case within the decision of Chaffee County vs. Potter."

Your petitioner respectfully declares that this decision in effect holds that a Board of County Commissioners, in the face of constitutional as well as statutory prohibitions and in the face of records which are required thereby to be kept, of existing facts, may certify such facts to be otherwise, and such certificate will estop the county, the Constitution and laws thereof to the contrary notwithstanding. This conclusion is not supported by Chaffee County vs. Potter, but is denied by that and by every other decision of this honorable Court, upon the subject.

7. The said honorable Court of Appeals erred in that part of the second division of its said opinion which reads as follows:

"The debt created by the bonds in this case was incurred not at the time the Board of Commissioners determined that it was necessary, nor when the qualified voters of the county gave authority to incur it, nor at the date of the bonds, they having been antedated, but at the date later than September 6, 1880, when the bonds were, in fact, issued and sold. The bonds recite that the whole issue is \$50,000, and this recital was notice to the purchasers of the bonds of the creation of an indebtedness of the county to that amount. The assessed valuation of the taxable property of the County of Lake, according to the assessment which was completed by equalization on September 1, 1880, was \$11,124,489. This assessed valuation, in view of the vote authorizing the creation of

the indebtedness, would admit of a lawful aggregate of indebtedness of that county to the extent of upwards of \$66,000. So that the recited amount of that issue of bonds was not of itself notice to a purchaser that the lawful aggregate limit of indebtedness had been passed, even if such purchaser was bound to take notice of the assessed valuation of the taxable property of the county."

The bonds in suit, although they may have been actually issued subsequent to September 1st, were issued in exchange for others which, prior to that time, and on or before the 31st of July, 1880, had been issued. They were exchanged for some reason satisfactory at the time to the contracting parties. About this fact there is no dispute. Indeed, the bonds bear date July 31, 1880, that being the time when they began to bear interest. The assessment for the year preceding was \$3,485,628, and that assessment extended from September 1, 1879, to September 1, 1880; hence, a purchaser of a bond bearing date July 31, 1880, comparing it with the assessment then in force, could easily determine that the total amount of the indebtedness of the county for all purposes which could be then incurred was a trifle over \$40,000, and instead of being governed by the assessment for September 1, 1880, would be estopped under the decisions of this honorable Court to question the invalidity of the bonds issued.

8. But the Constitution expressly prohibits counties from incurring a debt by loan in any one year which would exceed \$3 per thousand on counties having the valuation of less than five

millions, and a dollar and a half per thousand on counties having a greater valuation. It would, therefore, appear that the said county, even though the said bonds were issued under the valuation of September 1, 1880, would be powerless to exceed for said purpose for that year the sum or amount of \$30,000.

9. Your petitioner further respectfully submits that the said honorable Court of Appeals erred in declaring in the second division of its said decision that "the Court below erred in overruling the plaintiff's objections to the County Clerk's account book, the warrant register and the proof of publication of financial statements. None of this evidence was material, as none of it constituted constructive notice to a *bona fide* purchaser of bonds." The fact that semi-annual statements appeared in what was called the County Clerk's account book and that proof of publication of financial statements was offered as covering a part of the time when the bond issue was provided for, indicates that some testimony was offered upon the subject. The warrant register is required to be kept by a provision of the same law under which these bonds were issued, and it is by said law made a public record. If would-be purchasers are bound by the record of semi-annual statements, they are equally bound by the record of the warrant register.

10. Your petitioner respectfully submits that all of the third division of the said decision of the said honorable Court of Appeals is error. The said honorable Court in substance determines in said

part of said opinion that the constitutional restriction of the amount of debt by loan which a county can be allowed to contract in any one year is merely directory, and that your petitioners' contention to the contrary rests upon a misconception of a sentence in the opinion of this honorable Court in *Lake County vs. Rollins*, 130 U. S., 662-669, the said sentence being:

"Here the matter of indebtedness by loan is completed and the section passes to a broader subject."

The said honorable Court in said part of said opinion also declares that the case of *The People vs. May*, 9 Colo., 80, does not touch the question of how much indebtedness by loan may be contracted by a county in any one year after authority has been given by a majority vote of the qualified electors to contract the indebtedness.

Your petitioner respectfully submits that the conclusion of said honorable Court of Appeals, as set forth in said part of said opinion, to wit, that "it would be singular, indeed, if, after authorizing a county upon vote of its qualified electors to create a specified indebtedness for the erection of necessary public buildings, the same provision should cripple the power to erect such buildings by requiring that the long-time bonds authorized should only issue and be sold in small annual installments, making the county wait, perhaps, a series of years before getting enough money to warrant it in beginning the erection of necessary public buildings, and be paying, in the meantime, interest on the earlier bonds, the pro-

ceeds of which would be lying idle, awaiting the accumulation of enough to begin with," is palpable and grievous error, and entirely at variance with the said Rollins decision of this honorable Court, and of others upon the same subject. The constitutional section under consideration cannot be so construed as to make the county wait a series of years before getting enough money to warrant it in beginning the erection of necessary public buildings. Fifty per cent of the entire limit is permitted to be raised in any one year, and two years would, therefore, be the limit of time in which such amount could be raised. An entire series of bonds could be issued immediately before and immediately after the commencement of a fiscal year, and the entire sum required could be thus provided for. It is true, as declared by said honorable Court, that this honorable Court in the Sutliff case declared the statute of March 24, 1877, to be in conformity with the Constitution, but it is not true that such legislative construction conforms to the views expressed by the honorable Court of Appeals.

11. The said honorable Court of Appeals further erred, in the fourth division of its said opinion, in declaring that the said County of Lake received full consideration for the bonds; that most of them were taken by the contractor who erected the public buildings for which they were used, or that they passed immediately to *bona fide* holders for full value. Your petitioner has heretofore referred to these considerations.

12. The said honorable Court of Appeals also erred in declaring, in the fourth division of its opinion, that the county acknowledged and ratified said bonds by paying the interest upon them as it matured for several years. Ratification of a void act has never been held in any other Court to give such vitality, and if these bonds were void, because issued without authority, no payment of any part thereof can validate them.

The said honorable Court of Appeals further erred in the fourth division of its said opinion by declaring that if it were conceded that after the Board of County Commissioners of Lake County had been, by a vote of the qualified electors, empowered to create a debt of \$50,000 to erect necessary public buildings, they were required to execute that power by issuing not more than \$16,500 of the \$50,000 in any one year, and they issued the whole \$50,000 at once instead of issuing the same in yearly installments, the case would not be one of lack of power to issue all of the bonds, but a case where the power existed, but was irregularly exercised. In such case, the payment of interest on the bonds for several years estops the county from asserting such irregularity as a defense."

If it be true that the Commissioners of Lake County could only issue \$16,500 of bonds in any one year, they would have no power to issue more than \$33,000 in all, and the issuance of \$50,000 in bonds would be void in any event. The case would be one of lack of power to issue all the bonds,

and would not be a case where the power existed, but was irregularly exercised.

Your petitioner respectfully denies that a constitutional prohibition can or should be construed to be something to be disregarded and the disregard of which shall be called a mere irregularity. It respectfully declares that the payment of interest upon its bonds for any time cannot estop the county from asserting a constitutional defense which, if sound, makes the ^{an} answer a nullity.

Your petitioner respectfully suggests and submits to this honorable Court that, by this said opinion, given by a divided Court, one rule of construction for the validity or invalidity of municipal bonds has been established by the honorable Circuit Court of Appeals for the Eighth Judicial Circuit of the United States, while another and entirely different rule of construction prevails in this honorable tribunal; that the said decision is at variance and in conflict with and disregard of the decisions of this honorable Court in kindred cases from the Town of Coloma vs. Eaves and Dixon vs. Field down to the present time, and that, if the said opinion be permitted to stand as the rule in said honorable Court, bonds, contracts and obligations issued under circumstances, conditions, prohibitions and notice heretofore by this honorable Court held to make them absolutely null and void as against all persons whomsoever, will, in said honorable Court of Appeals, be declared to be valid, binding and enforceable against your petitioner and others, notwithstanding said decisions and declarations of this honorable

Court to the contrary, and that this decision in particular inflicts great, lasting and enormous expense and injury upon the taxpayers of the said County of Lake, your petitioner having refused to pay the interest upon said bonds, by reason and on account of the decisions of the Supreme Court of the State of Colorado and of this honorable Court in kindred cases, involving the same questions.

Your petitioner, therefore, respectfully prays this honorable Court to issue a writ of *certiorari* to said United States Circuit Court of Appeals for the Eighth Judicial Circuit, requiring it to certify to this Court, under Section 6 of said act of Congress approved March 3, 1891, a full, true and complete record of the said cause of Harry H. Dudley, plaintiff in error, vs. The Board of County Commissioners of the County of Lake and State of Colorado, defendant in error, and numbered 821 on the dockets of said Court, with all convenient speed; that this honorable Court will review the same, and determine whether error has been committed by the said Court in its said decision as herein alleged, and also to set at rest and finally determine, among other things, first, whether the said issue of bonds of the said County of Lake on the 31st day of July, 1880, as set forth in said complaint, are valid, lawful and binding obligations upon said county, or whether the same are null and void under the Constitution and laws of said State for want of power to issue the same.

2. Whether the said plaintiff is a *bona fide* or other holder or owner of said bonds or coupons,

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or has any right or authority whatsoever to institute, prosecute or maintain the said action or any appeal or writ of error therefrom or thereto.

3. Whether the said decision of said honorable Court of Appeals in said cause is in harmony or in conflict with the decisions of this honorable Court upon the subjects and issues therein involved and presented, and

4. Whether the construction heretofore given by this honorable Court to Section 6, Article XI, of the Constitution of the State of Colorado and of the said legislative act of March 21, A. D. 1887, is or is not binding upon the said honorable Court of Appeals and all other federal tribunals.

And, in duty bound, your petitioner will ever pray.

GEORGE R. ELDER,
C. S. THOMAS,
WILLIAM H. BRYANT,
HARRY H. LEE,
Attorneys for Petitioner.

UNITED STATES OF AMERICA, {
DISTRICT OF COLORADO. } ss.

On this _____ day of _____, A. D. 1897, person-

ally came _____,
who, being first duly sworn according to law, de-
poses and says that he is the Chairman of the
Board of Commissioners of the County of Lake
and State of Colorado, the petitioner in the
above entitled petition; that he has read the
above and foregoing petition for writ of *certiorari*
in said cause, and that the matters and things
therein set forth are true, according to the best
of his knowledge, information and belief.

No. 177.

Statutes &c.

OFFICE SUPREME COURT U. S.
FILED

DEC 14 1898

JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

Filed Dec. 14, 1898.
No. 177.

THE BOARD OF COUNTY COMMISSIONERS OF
LAKE COUNTY, PETITIONER,

vs.

HARRY H. DUDLEY, RESPONDENT.

**Writ of Certiorari to the Circuit Court of Appeals for
the Eighth Circuit.**

EXTRACT OF GENERAL LAWS OF COLORADO, 1877, PARA-
GRAPH 2349, SECTION 110, PAGE 782.

Sec. 2349, Gen. Laws of Colorado for 1877, being sec.
110 of act entitled "An act to provide for the assess-
ment and collection of revenue, and to repeal certain acts
in relation thereto," and being sec. 3866, Mills' Annotated
Statutes.

"It shall be the duty of the treasurer of each county to make
a settlement semi-annually with the board of county com-

missioners at their first meeting in January and July ; and the county clerk shall, immediately after such settlements are made, make out a statement upon blanks to be provided by the auditor for that purpose, showing the exact condition of the State revenue in his county ; the balance due the State, and of all credits due the county by reason of double or erroneous assessments ; and amounts refunded to purchasers of real estate erroneously sold. Said statements shall be authenticated by the county seal, the signature of the county clerk and the majority of the board of county commissioners, and shall be made out in duplicate, one of which the county clerk shall preserve in his office, the other he shall immediately transmit to the auditor."

GEORGE R. ELDER,

C. S. THOMAS,

W. H. BRYANT,

H. H. LEE,

Attorneys for Petitioner.

No. 474. 177.

Brief of Thomas & Bryant for
474 Petitioner

FILED
OCT 15 1897
JAMES H. McKENNE
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Filed Oct. 15, 1897.
IN THE SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1897.

THE BOARD OF COUNTY COMMISSION-
ERS OF THE COUNTY OF LAKE
AND STATE OF COLORADO,

Petitioner,

VS.

HARRY H. DUDLEY,

Respondent.

Brief in Support of Petition for Writ of Certiorari.

C. S. THOMAS,
WILLIAM H. BRYANT,
HARRY H. LEE,
Attorneys for Petitioner.

GEORGE R. ELDER,
County Attorney.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1897.

THE BOARD OF COUNTY COM-
MISSIONERS OF THE COUNTY
OF LAKE AND STATE OF COL-
ORADO,

Petitioner,

VS.

HARRY H. DUDLEY,

Respondent.

Brief in Support of Petition for Writ of Certiorari.

It is alleged in the petition filed with this brief that the Court of Appeals for the Eighth Judicial Circuit, Judge Thayer dissenting, erroneously decided said cause and, in so doing, either misinterpreted or overlooked decisions of this Court in similar cases.

Twelve assignments of error have been particularly noted, and they may be considered under the four propositions which this honorable Court, by granting the writ prayed for, is requested to determine. These are, whether the issue of bonds by the County of Lake on July 31, 1880, as set forth in said complaint, is void or valid; whether the plaintiff has any right or authority to institute

or maintain said action; whether the said decision of the Court of Appeals harmonizes or conflicts with the decisions of this Court in similar cases, and whether the construction heretofore given by this Court to Section 6 of Article XI. of the Constitution of Colorado, and the legislative act of March 21, 1877, is to be followed or disregarded by the Court of Appeals.

Primarily, the right of the plaintiff to sue should be considered and disposed of.

I.

The plaintiff is not a *bona fide* or other holder or owner of the bonds or coupons in controversy, and, consequently, cannot maintain this action.

This case was commenced on the 31st day of March, 1892. After reciting the manner in which the bonds were issued and the default in the payment of interest upon all coupons subsequent to those numbered one, two and three, the plaintiff declares that "he became the purchaser of said coupons before this action for a valuable consideration paid by him and without notice of any claim at law or in equity affecting their validity." (Transcript, page 8.)

In its answer, the defendant declared, as to this allegation, that it had not and could not obtain sufficient knowledge or information upon which to base a belief. Section 56 of the Colorado Code of Practice provides that "In denying any allegation in a complaint not presumptively within the knowledge of the defendant, it shall be sufficient

to put such allegation in issue for the defendant to state as to such allegation that he has not and cannot obtain sufficient knowledge or information upon which to base a belief." And where the language of the section is conformed to in the pleading, the issue is said to be complete.

James vs. McPhee, 9 Colo., 486.

Haney vs. The People, 12 Colo., 245.

Pomeroy's Remedies and Remedial Rights, Sec. 640.

Both plaintiff and defendant assumed the title and *bona fides* of the plaintiff to be in issue. The plaintiff introduced George W. Wright and Edward W. Rollins, both of whom testified as to the plaintiff's ownership. Six bills of sale of various dates were also introduced in evidence in support of the claim.

Wright testified that Dudley was the owner and that he purchased the bonds for Dudley upon the latter's instructions, although he cannot remember having paid a cent for Dudley at any time. The bills of sale, with the exception of one, seem to have been made shortly after the county defaulted upon its coupons—the exception being Exhibit 3, dated December 5, 1888.

Mrs. Jones recites that for value received she sold certain bonds and coupons to the plaintiff (Exhibits 3 and 7, pages 39-42, printed transcript).

Messrs. David Creary, J. H. Jagger, H. D. Hawley and L. C. Hubbard declared that in consideration of \$5,380.56 they made sale of seven bonds of the series (Exhibit 4, page 39).

The Nashua Savings Bank by its bill of sale acknowledges the receipt from Dudley of \$11,869.45 in payment of bonds 92 to 111, inclusive.

The Union Five Cent Savings Bank, in Exhibit 6, in consideration of \$10,695 paid by Harry H. Dudley, sold to him bonds 112 to 129, and Joseph Standley acknowledges the receipt of \$15,887.50 from the plaintiff in consideration of the bonds by him transferred. (Transcript, pages 39-43.)

There is nothing to indicate where these bills of sale were made, and it is fair to presume that they were made where the sellers resided. Mr. Rollins testified that Mr. Dudley is the present owner of the bonds, but on cross-examination does not know how or from whom he purchased them, and only knows that he is the owner because he sent the bonds to him with proper bill of sale to substantiate his claim. Mr. Rollins is the head of a corporation known as E. H. Rollins & Sons, dealers in municipal securities, and Mr. Dudley was one of the Directors. (Transcript, pages 45-47.)

This constitutes the substance of the plaintiff's testimony as to the ownership of the bonds.

The defendants, suspecting the falsity of Dudley's claim to ownership of the bonds, took his written deposition, which was filed on January 21, 1895, in which he carefully avoided any statement as to any payment of money by him for the bonds, but did say that he understood the bonds and coupons were transferred to him for the purpose of bringing the suit against the county to

make it pay its honest debts. (Transcript, page 56.) In consequence of the ambiguous character of this deposition, the defendants took another, the last being upon oral instead of written interrogatories. From that deposition it conclusively appears that the answers to the first had been carefully written out for Mr. Dudley by his attorney; that the bonds mentioned in the bills of sale were still owned by the grantors therein mentioned; that the plaintiff did not even know that the bills of sale were made to him until the year 1894, or after they were nine years old; that he did not have possession of the bills of sale until 1894, and then but temporarily; that he never paid a dollar to any person whomsoever for any of the bonds or coupons; that all moneys which might be collected in the pending suit would be paid over to the owners of the bonds; that Mrs. Jones and Mr. Standley, two of his assignors, were citizens of Colorado; that the only interest which he has or had in the bonds or any of them consists of his interest as a stockholder in the firm of E. H. Rollins & Sons; that he never told Wright to buy the coupons forming the subject of the suit, and, above all, that he never had the bonds or coupons in his possession, although he saw some of them in a safe in Boston in the year 1893, which was before he knew that such a thing as a bill of sale to himself had ever been made. Never having bought them, never having paid anything for them, never having had them in his possession and having no knowledge of the pendency of the suit until the year 1894, or two years after the same was brought, he cannot be considered as a

bona fide holder, either for value or otherwise, without doing violence to every principle which enters into the definition of the term. Nevertheless, in the face of such a record, the Court of Appeals declares that "the plaintiff, *by the delivery to him of the coupons and written assignments thereof*, became the legal owner of such coupons and entitled to maintain an action upon them whether he had actually paid the former owners or not. Holding them by valid written transfers from former *bona fide* holders for value, he succeeded to all rights of such former holders. No defense is pleaded which makes it material whether the plaintiff under such circumstances did or did not pay value for the coupons."

The Circuit Courts of the United States are of limited and specific jurisdiction. If presumptions are to be indulged in cases of doubt, they are to be construed against its existence, and any collusive or wrongful action made for the purpose of conferring it should be defeated.

It will be noticed that the Court of Appeals assumes that the coupons and written assignments had been delivered to the plaintiff. This is absolutely without foundation, since the plaintiff himself testifies that he never even saw the bonds but once, and that was before he knew he was their owner, and never saw the assignments but once in December, 1894. It has been decided that the Circuit Court has no jurisdiction where the nominal parties have been made so collusively to bring the controversy within its jurisdiction.

Marion vs. Ellis, 9 Fed. Rep., 367.

When parties convey land to a stranger, a citizen of another State, without his knowledge and without consideration, for the purpose of creating jurisdiction in the United States Courts, the transaction is only colorable and collusive and the suit must be dismissed.

Coffin vs. Haggin, 11 Fed Rep., 219.

Fountain vs. Town of Angelica, 12 Ibid., 8.

The identical question has been determined by this Court in Lytle vs. Lansing, 147 U. S., 59. The facts in that case were not so strong as they are here. There the bonds were actually delivered to the plaintiff—not only so, but he claimed to have paid as a consideration an interest in a ranch in Texas. This Court, quoting with approval the doctrine of Wormley vs. Wormley, that “It is a settled rule in equity that a purchaser without notice, to be entitled to protection, must not only be so at the time of the contract or conveyance, but at the time of the payment of purchase money,” and refusing to recognize the claim that this principle has no application to the purchase of negotiable instruments like the bonds in question, declares that “It is impossible to avoid a conclusion that the purchases of the bonds were never made in good faith, but were merely fictitious, and that their real ownership is still in some one who is affected with notice of their invalidity and has endeavored by feigned transfers to get them into the hands of some one who can pose before the Court as a *bona fide* purchaser.”

The position taken by this Court and by the Court of Appeals upon this subject cannot both be

correct. One or the other must give way. Lytle vs. Lansing is in strict accord with both principle and authority, and should prevail.

But the Court of Appeals declares that the plaintiff holding the bonds by written transfers from former *bona fide* holders for value, he succeeded to all the rights of such former holders. We contend that there is not a syllable of testimony in the record which supports the contention that the assignors of the plaintiff, either mediate or immediate, were *bona fide* holders of the bonds. It is not pretended that the Court House contractor or Jones, the original purchasers, were either of them unaware of their invalidity. The original purchaser from the contractor says that he went to Lake County, examined into the circumstances, and thought the bonds were good. If he examined into the facts, he was informed of them, and his conclusion as to their effect upon the bonds cannot be the accepted standard of their validity. What he thought or failed to think is of no possible consequence. Inasmuch as Mr. Rollins did not descend into particulars and tell the jury what he did or did not examine, it is right to assume that he knew what the indebtedness of the county was, what its assessed valuation was, and what were the limitations upon the debt-creating capacity of the county at the time of their issue. Mr. Rollins bought \$39,000 worth of the bonds and says that he sold them as soon as he could. Whether he sold them to the immediate assignors of Mr. Dudley or to some one else does not appear. Whether he sold them to any

one without telling them all he knew of the facts is equally uncertain. But if, as a fact, Mr. Rollins assured the vendees that the bonds were good at the time of his transfer to them, he would doubtless have said so. It is not possible, however, to justify the conclusion of the Court as to the *bona fides* of the ownership of Dudley's pretended assignors without assuming that because the record is silent upon an important question, which is made an issue in the case, the issue is, therefore, proven.

If the decisions of this honorable Court concerning the effect of certain recorded facts upon the *bona fides* of any holder, whatever his actual knowledge may have been, is to determine the rights of the parties here, then the question of the *bona fides* of Dudley's vendors is wholly immaterial.

But the Court proceeds to say that no defense is pleaded which makes it material whether the plaintiff, under such circumstances, did or did not pay value for the coupons, and—

Sheridan vs. Mayor, 68 N. Y., 30. and

Commissioners vs. Bolles, 94 U. S., 104,
are cited in support of this conclusion.

The case of Sheridan vs. The Mayor decides that a plaintiff suing upon an assigned claim is the real party in interest under the Code. If he has a valid transfer against the assignor and holds the legal title to the demand, the defendant has no legal interest to inquire whether the transfer was an actual sale or merely colorable, or whether a consideration was paid therefor. The action was

brought originally by one Morgan Jones upon an account for work done for and materials furnished to the defendant, and the claim was assigned to Sheridan by Jones, after which Sheridan was substituted as plaintiff. The Court declares that the plaintiff is the real party in interest if he has a valid transfer as against the assignor and holds a legal title to the demand; that it is not of any moment that no consideration was paid for the demand by the assignee, since the assignor could give it to the plaintiff or sell it to him for an adequate or without any consideration.

It will be noticed, first, that the question of the rights of an alleged *bona fide* holder, as contrasted with those of an original holder, were not there in controversy. Then, too, the assignment of the cause of action was made pending the litigation, consisted of an open account instead of a negotiable instrument. The question of jurisdiction was also absent from the controversy, whereas, here *bona fide* ownership in a non-resident is essential to the jurisdiction of the Circuit Court of the United States as against a citizen. The two cases are in no respect parallel to each other.

The case of the Commissioners vs. Bolles, 94 U. S., does not seem to be apposite to the question under consideration, and neither of them can or does, in any wise, affect the doctrine of Lytle vs. Lansing.

The Court of Appeals further declares that the second instruction asked for by the plaintiff was correct and the refusal of the trial Court to

give the same was error. That instruction is as follows:

"The Court instructs the jury that the plaintiff in this case, Harry H. Dudley, being a non-resident of the State of Colorado, and a citizen of the State of New Hampshire, as appears by the evidence in this case, had a legal right to purchase the bonds and coupons in question for the purpose of enforcing the same by this action, and such purchase, as shown by the evidence in this case, is lawful and valid and operated to transfer the legal title of said bonds and coupons to him."

That Mr. Dudley had a legal right to purchase the bonds and coupons in controversy, does not admit of question. But we emphatically deny that any purchase, valid or otherwise, was shown by the evidence in this case to have been made to him. If that instruction is correct and such a transaction makes Mr. Dudley a *bona fide* purchaser of the bonds in suit, then the law, as heretofore administered, has been very much misunderstood.

If the instruction prayed for and refused correctly stated the law, then this Court in *Lehigh Mining and Manufacturing Co. vs. Kelly*, 160 U. S., 327, misstates it. In the case cited it appeared from the agreed statement of facts that the land in controversy had been claimed by a Virginia corporation prior to March 1, 1893, on which date it executed and delivered a conveyance thereof to the Lehigh Company, a Pennsylvania corporation, in fee simple; that the Pennsylvania Company was organized by the individual stockholders and

officers of the Virginia Company, and the conveyance was made to it to give the Court jurisdiction, but that the conveyance passed to the Lehigh Company all of the right, title and interest of the Virginia Company, since which time the latter never had any interest therein. Such a conveyance was held insufficient to invest the Lehigh Company with the power to wage a suit in the Federal Court, and the reasoning of the case is unanswerable.

"The arrangement," says Mr. Justice Harlan, "by which, without any valuable consideration, the stockholders of the Virginia corporation organized a Pennsylvania corporation and conveyed these lands to the new corporation for the express purpose—and *no other purpose is stated or suggested*—of creating a case for the Federal Court, must be regarded as a mere device to give jurisdiction to a Circuit Court of the United States and as being, in law, a fraud upon that Court, as well as a wrong to the defendants. Such a device cannot receive our sanction."

If, in the case at bar, the pretended transfer to Dudley was not for the express purpose of creating a case for the Federal Court, it must have been for the additional purpose of putting forward a pretended *bona fide* holder of the bonds against the county. If this be true, one device is as fraudulent as the other, and both united cannot lawfully effect the purpose had in view.

The decision complained of is equally obnoxious to the doctrine of *Farmington vs. Pillsbury*, 114 U. S., 138. That, like this, was a suit

upon coupons of municipal bonds. The State Court in Maine had decided that they were a nullity, after which coupons were gathered up and transferred to Pillsbury, a citizen of Massachusetts, under an arrangement by which he gave his promissory note for \$500, payable two years from date, with interest, and agreed, as a further consideration, that if he succeeded in collecting the coupons, he would pay the agent fifty per cent of the full amount collected above the \$500. He brought his suit in the Circuit Court of the United States for the District of Maine. The Court declared the whole transaction to be a fraud; and Chief Justice Waite emphatically pronounced the suit to be one for the benefit of the owners of the bonds. "They are to receive from the plaintiff one-half of the net proceeds of the case they have created by their transfer of the coupons gathered together for that purpose. The suit is their own in reality, though they have agreed that the plaintiff may retain one-half of what he collects for the use of his name and his trouble in collecting. It is true the transaction is called a *purchase* in the papers that were executed, and that the plaintiff gave his note for \$500, but the time of payment was put off for two years, when it was, no doubt, supposed that the result of the suit would be known. No money was paid, and as the note was not negotiable, it is clear that the parties intended to keep the control of the whole matter in their own hands, so that if the plaintiff failed to recover the money, he could be released from his promise to pay."

In the case at bar, the formality of executing a promissory note was not even considered. Dudley paid nothing and agreed to pay nothing. He did not even hire an attorney. Every cent to be collected by him goes to his alleged assignors and to no one else.

In *Detroit vs. Dean*, 106 U. S., 537, a similar attempt to confer jurisdiction was declared by Mr. Justice Field to be "a mere contrivance, a pretense, the result of a collusive arrangement to create, in favor of the plaintiff, a fictitious grant of Federal jurisdiction."

We are aware that it will be contended that but two of Dudley's assignors were citizens of Colorado, and hence, a transfer to him was not necessary for the purpose of giving the Federal Court jurisdiction of the case. This statement is an admission of our contention as to two of the assignors, and to that extent it is good. The only possible excuse, therefore, which can be used to justify the pretended transfer by the others is that a *bona fide* holder was necessary, and hence the pretended transfer without consideration, without delivery, and without knowledge on the part of the assignee of the fact that the transfer was made.

Since the rights of *bona fide* purchasers of invalid securities have been recognized and enforced by the Courts, men have resorted to many devices for the purpose of creating them. *Bona fide* holders have been made sometimes by feigned transfers to outside parties who have conveyed back to original holders. They have sometimes

been invested with title to securities for the sole purpose of enabling their real owners to bring suits in the names of such holders, the proceeds of the suit coming direct to the real holders without reference to the name or character of the plaintiffs. Men have shut their eyes to the most obvious facts that they might testify to their innocence, and in many instances those intending to purchase bonds prior to their issue have systematized their conduct so as to enable them to assume the attitude of *bona fide* holders. These things are culpable enough, but what shall we say of a case like this where the plaintiff, without his knowledge, was invested with title to nearly \$100,000 worth of bonds and coupons for which he never paid a cent and of which he remained in ignorance for nine years afterwards, when no delivery whatever of the written assignments, bonds or coupons was made to him, and when suit was brought in his name for the recovery of the coupons matured, he being innocent of the fact for two years thereafter? Such conduct was the result of a deliberate purpose, and that purpose we can readily conjecture. Such conduct robs him completely of any presumption of *bona fides*. It also clearly indicates that the actual owners of the bonds and coupons are not and never were *bona fide* holders, and, consequently, they felt impelled to make the transfer to Dudley or some one else that they might shield themselves behind his presumptive ignorance of all the facts which invalidated them. These circumstances clearly indicate that Roberts, the contractor, and Rollins, the purchaser, knew of the

invalidity of the issue of these bonds, but concluded, nevertheless, to compel the county to pay under the plea that Dudley, the assumed owner, would be greatly wronged and outraged if the county should avoid responsibility to him. If the immediate grantors of Mr. Dudley were *bona fide* holders, no possible reason for the pretended transfer to Dudley can be imagined. They might have brought suit in their own names upon the coupons belonging to them and obtained judgment as well by reason of their own *bona fides* as by that of Mr. Dudley.

But two of his assignors, Mrs. Jones and Mr. Standley, were citizens of Colorado. They could not have waged this action in the Federal Courts. One of them, Mrs. Jones, heiress and executrix of the original purchaser of the bonds, was bound by any and all knowledge which she possessed of their invalidity. Their transfers were a palpable fraud upon this Court, intended solely and only to enable it to adjudicate upon their claims, they being the actual owners and the transfer being utterly, absolutely and totally worthless.

It is significant that not one of the assignors was called upon by the plaintiff to testify either to the *bona fides* of their ownership or of their transfer to the plaintiff. From beginning to end, they have been silent. Is not this, therefore, a material issue, and one the evidence upon which clearly indicates, in the language of the opinion in *Lytle vs. Lansing*, that the purchases of these bonds were never made in good faith, but were merely fictitious, and that their real ownership is still in

some one who is affected with notice of their invalidity and has endeavored by feigned transfers to get them into the hands of some one who can pose upon the Court as a *bona fide* purchaser. This error, independent of all others in the case, is sufficient to invalidate the decision of the Court below and to justify at the hands of this Court the granting of the writ of certiorari.

In *McLean vs. Valley County*, 74 Fed. Rep., 389, the plaintiff brought suit *inter alia* upon certain coupons from bonds of Valley County, belonging to Ball and others, which had been transferred to the plaintiff by delivery, for purposes of collection. Judge Shiras held that under the Nebraska statute requiring actions to be brought in the name of the real party in interest, the plaintiff could not recover as to such coupons. The Colorado statute, Code, Section 3, requires that every action shall be brought in the name of the real party in interest, except as otherwise provided, and no further provision is made therein for cases like the one at bar.

II.

The bond issue of Lake County, bearing date July 31, 1880, was and is null and void under the Constitution and laws of Colorado.

This broad proposition involves a careful analysis of the second division of the opinion of the Court of Appeals and of some portions of the official statement of the facts disclosed by the record. We do not feel at liberty in assailing the opinion to repeat what was urged before said

Court in argument, except in so far as such repetition becomes necessary, but we respectfully submit that the reasoning embodied in the Court's opinion as the basis of its conclusion places a new and strange construction upon the power of municipal corporations in Colorado to incur debt, and misapprehends or misapplies the doctrine of the Supreme Court of Colorado, and of this Court, in similar cases. To determine whether this is so it may be well to state some of the undisputed facts of the record as a basis of our contention. We assume, therefore, the existence of the following facts as indisputable:

1st. That Section 6 of Article XI. of the Constitution of Colorado as the same existed when the bonds in controversy were issued is correctly set forth in the statement preceding the Court's opinion.

2d. That the act of March 24, 1877, entitled "An Act Concerning Counties, County Officers and County Government and Repealing Laws on These Subjects," is the act under which the bonds were issued, and consists in all of 143 sections.

3d. That Section 30 providing for the publication of semi annual statements, Section 44 providing for the keeping of a warrant register by the Clerk of the county, Section 112 providing for the keeping of a similar registry by the County Treasurer, and Section 21 providing for the entry of an order of record specifying the amount required and the object for which a debt by loan is to be created upon being so authorized by a

vote of the people, are all parts and portions of said act.

4th. That the assessed valuation of the County of Lake for the year 1879 was \$3,485,628, and for the year 1880, \$11,126,489, and that the limit of indebtedness by loan which could be contracted by the county in any one year, if the constitutional section involved is to be strictly construed, was \$3 upon \$1,000 in 1879, and \$1.50 per \$1,000 in 1880.

5th. That the semi-annual statement of the financial affairs of the county on January 1, 1880, as required by Section 447 of the General Laws of Colorado, being Section 30 of the Act of March 24, 1877, was ordered to be made and published in the *Carbonate Weekly Chronicle* and the *Leadville Weekly Democrat* (transcript, page 119); that said publication showing an indebtedness of \$84,296.28 on January 1, 1880, was had in the *Carbonate Weekly Chronicle* (transcript, p. 114), and that the said statement was recorded by the County Clerk as provided by said section. (Transcript, pages 79-83.)

6th. That a similar record of the official condition of the county was recorded as provided by said statute and showing said condition on July 1, 1880, with an outstanding indebtedness of \$198,394.57. (Transcript, page 80.)

7th. That the book containing these entries was a public record subject to public inspection in the office of the Clerk and Recorder of Deeds in and for said county at all times.

8th. That the warrant register of Lake County, a public record kept as provided by the said act of March 24, 1877, shows the outstanding indebtedness of Lake County to have been \$58,382.46. on October 7, 1879; \$86,146.81 on December 31, 1879; \$209,897.55 on June 30, 1880, and \$362,683.23 on December 31, 1880. (Transcript, page 84.)

9th. That on September 4, 1879, the Board of Commissioners registered an order that the amount of money required for the erection of public buildings and construction of roads and bridges was \$5,000, and that the question of making a loan therefor be submitted to a vote of the electors. (Transcript, page 86.)

Counsel for the respondent challenged the materiality and competency of the proof offered of the existence of this indebtedness. They will not deny that the same appears in the record as above outlined.

* In addition to the above facts, it may be well to remind the Court that in Section 21 of the act of March 24, 1877, that being the section authorizing a bond issue, it is provided "that the aggregate amount of indebtedness of any county exclusive of debts contracted prior to July 1, 1876, in which the assessed valuation of property shall exceed \$1,000,000 for all purposes, shall not be in excess of the following ratio, to wit: Counties in which the assessed valuation of property shall exceed \$5,000,000, \$6 on each \$1,000 thereof; counties in which the assessed valuation of property shall be

less than \$5,000,000 and exceeds \$1,000,000, \$12 on each \$1,000 thereof."

The time when a certificate of assessed valuation of a county goes into operation has been fixed by the Supreme Court of Colorado in the late case of the County Commissioners vs. Standley, as the 1st of September of each year. These valuations are recorded in the office of the Auditor of State and with the County Clerk of each county. The assessed valuation of 1879, therefore, began on the 1st day of September and ran for one year. On September 1, 1880, that of 1880 began and continued until September of 1881. The bonds were bid for and their issue ordered prior to July 31, 1880. Ten thousand seven hundred and fifty dollars worth of them were ordered to be issued on October 27, 1879, and these, on March 17, 1880, were sold to Walter H. Jones. On April 27, 1880, an additional issue of \$10,750 of said bonds was provided for. (Transcript, pages 92-97.) On July 14, 1880, the action of April 27, 1880, was rescinded and an issue of \$39,250 in bonds was provided for. (Transcript, pages 98-101.) On July 26th, the proposition of L. E. Roberts to buy bonds to the amount of \$10,250 at 95 cents was accepted and Roberts was given a refusal to take the remainder at the same price. On August 3d, Mr. Roberts' bid for bonds to the value of \$39,250 at 95 cents was accepted, and on September 6, 1880, a final order for the issuance of \$50,000 of bonds was made, and in that order, on page 108, it is recited that \$11,000 of the bonds provided for be exchanged with Walter H. Jones for \$10,750 of

the bonds heretofore issued to him, he paying L. E. Roberts for the extra or additional amount the sum of \$250, the old bonds then to be canceled and destroyed. It is evident that the date of the issue of these bonds, July 31, 1880, was adopted because at or about that time bids for the total amount thereof were accepted, but the annual interest coupons attached to the bonds, each being for ten per cent of the principal matured on the 1st day of April, 1881, and every year thereafter. It is impossible to determine from this medley of circumstances just when the consideration was actually received for the bonds, or when they were issued. It is singular that the bonds dated July 31, 1880, should be accompanied with an annual interest coupon for the full amount of a year's interest, but running only nine months before maturity. We must conclude that although the present issue of bonds was actually delivered to the purchasers subsequent to the 1st of September, yet they must have been exchanged for bonds issued prior to that time. And this view is strengthened by the fact that the first of the present series is numbered 55 and the last 129, thus indicating that 54 bonds prior to that time must have been issued by the county authorities.

We shall not weary the Court by needless reference to its own opinions; nevertheless, some reference to them must be made in support of our assertion that the opinion of the honorable Court of Appeals in this case practically overrides them. We may safely conclude that in the various cases of Lake County vs. Rollins, Chaffee County vs.

Potter, Sutliff vs. Lake County, Dixon County vs. Field and Hedges vs. Dixon County, this Court has held that where by Constitution or statute, or both, limitations are placed upon the debt-creating power of counties, and a record is required to be kept of the assessed valuation of the counties on the one hand, and the amount of its indebtedness on the other, it is the record of these facts thus kept and not the determination of any official or officials that must be controlling. and if a would-be purchaser of bonds can, by comparing their recitals with both of these records, or with either of them, determine that the statutory limitation has been reached prior to or at the date of such bonds, or that the bond issue is in excess of such limitation, he cannot protect himself by any recitals upon the face of the bonds, however much they may contradict such records. If, in other words, a comparison of the total amount of the bond issue with the assessed valuation for the year in which the same was issued shows a violation of the prohibition, or if the record both of the assessed valuation and of the indebtedness shall show the same thing, no plea of *bona fides* can protect the bondholder. The Court of Appeals, however, has not only overlooked the effect of the assessed valuation of Lake County upon the validity of these bonds, but has declared that under the statute the Board of Commissioners has been endowed with power to determine the amount of the county indebtedness, and its recital that the law has been complied with concludes the county as

to the claims of an innocent holder, without notice.

That we do not misstate the position of the Court upon this position is apparent from the following quotation from its opinion:

“ This act (that is, the act of March 24, 1877) by its terms commits to the Board of County Commissioners the power to determine the necessity of creating an indebtedness for the erection of public buildings and of submitting the question to a vote of the qualified electors at a general election and of issuing the bonds, if the vote is favorable, keeping within the limitation contained in Section 21 in respect to the aggregate indebtedness of the county at the time of issuing the bonds. The granting of these powers necessarily intrusts to the Board of County Commissioners the power and duty of determining whether the proposition to create the indebtedness was carried at the election and the ascertainment of the fact that the aggregate amount of all forms of the county indebtedness was within such amount that it would not, by the issue of bonds, be made to overpass the prescribed limitation. Hence, except for the provision contained in Section 30 of the same act requiring the Board to make and publish the semi-annual statements of the indebtedness and financial condition of the county, requiring the Clerk of the Board to record such statements in a book to be kept for that purpose only and to be open to public inspection, the recital in the bonds above quoted would be conclusive and would estop the

county in a suit by a *bona fide* holder of the bonds or coupons."

Bearing in mind that this declaration completely loses sight of the effect of the record of the assessed valuation and of the registry of warrants, your Honors must observe that the Court of Appeals in effect declares that the only limitation upon the judicial power of the Commissioners to determine the aggregate amount of debts is the requirement of Section 30 that the Commissioners shall publish semi-annual statements of such indebtedness. It necessarily follows that if the Commissioners shall fail to make such semi-annual publication, they acquire by such failure a right to judicially determine the amount of the aggregate indebtedness of the county, and their determination thereof is, consequently, conclusive, notwithstanding that it may be utterly false. If the power conferred upon an official is limited by requiring the official to do something in connection therewith, it is a remarkable doctrine that by failing to observe the performance of such limitation, the person required to perform it obtains thereby absolute authority.

The honorable Court of Appeals, in support of this proposition, cites *Chaffee County vs. Potter*, 142 U.S., 355. In that case, none of the bonds recited the amount of the total issue. They did recite that the constitutional limitation had not been reached. The Court held that no holder of any one bond, by comparing the same with the record of assessed valuation, could learn whether the limit of indebtedness had been reached, and,

consequently, could not make the mathematical calculation mentioned in the Dixon County and Lake County cases. That decision was based upon a demurrer to the answer which merely alleged that the bonds had not been authorized to be exchanged for the warrants of the county; that they were issued in violation of Section 6 of Article XI. of the Constitution; that the debt which they assumed to fund was contracted in violation of said provision, and that the bonds were issued by the Board of Commissioners, without any valid legal consideration. No question was presented or argued as to the power of the Commissioners to make such certification, nor was the attention of the Court called to the provisions of the act of March 24, 1877, requiring semi-annual statements of indebtedness to be made, published and recorded. In the case at bar the total amount of the bond issue appears upon the face of the bonds, the semi-annual records of indebtedness were made, the record of assessed valuation was given in evidence, and it was perfectly easy for the holder of any one or more of the series, by comparing their amounts on the one hand with the records of assessed valuation, or, on the other, with the record of existing indebtedness, to determine beyond the possibility of mistake that the issue was unlawful. If Chaffee County against Potter is an authority in this case for the plaintiff, then it is difficult to conceive of any case in the books which can be cited in aid of the defendant's contention.

There is not—and up to this time it was never contended that there was—any authority, either by the Constitution or by the laws, or by both, in any Board of County Commissioners in Colorado, to judicially determine the amount of the indebtedness of the county. No such contention was made in the printed briefs of counsel, nor hinted at in the oral argument. If, indeed, the position of the Court of Appeals be correct, the Board of County Commissioners could as well have issued bonds for \$5,000,000 as for \$50,000, and each of them would have constituted a valid, subsisting obligation against the county, notwithstanding the total issue may have exceeded the total assessed valuation of all its taxable property.

The Court of Appeals justly declares that the case of *Sutliff vs. Lake County* deserves special attention, "inasmuch as that case passed upon and declared invalid the issue of \$5,000 of bonds which were authorized at the same time and by the same act, and upon authority of the same vote by which the bonds in suit were issued." It is contended by the Court of Appeals that the theory of the *Sutliff* case is that the purchaser of bonds issued under that act would have constructive notice of what the record of the semi-annual statement provided for by the act, and which it was his duty to examine, would have shown, had he in fact examined such record. "The fact that such record existed was there assumed. In this case the Court say that it is shown that there never were such semi-annual statements or record thereof covering any of the times which would affect the legality of

the bonds, and, therefore, the doctrine of the Sutliff case is not applicable." The statement that such records do not exist here is assumption, and nothing more. If the Court meant that it did not appear that all these statements were published, and that the publication as well as the record was necessary, it should have said so. If the Court meant that it did not appear that these statements were recorded in a book kept for that purpose only, and, therefore, they were not binding, it should have said so. If the Court meant that the statements were not kept, and, therefore, a search for their existence would have been useless, it should have said so. We submit that it is unfair to the record to say that they did not exist. We will discuss the character of the record disclosed by the character of the transcript in another connection, but we deny absolutely that the doctrine of the Sutliff case is confined to the existence of the record of semi-annual statements. That fact was most prominent in that case, because the entire bond issue was only \$5,000, and it did not appear directly or indirectly that another issue of \$50,000 authorized at the same time and by the same Board was in existence. The \$5,000 issue was clearly within the record of amount of assessed valuation. Therefore, its validity depended far more on the amount of the debt on the one hand than the assessed valuation upon the other. No Court has ever held, and we think no Court ever will hold, that where a comparison of the bond issue with the assessed valuation alone shows the former to be a nullity by reason of its amount, it

is necessary to look any further for the purpose of ascertaining what other indebtedness, if any, is in existence. It is only when a comparison of the amount of the bond issue with the assessed valuation shows the former to be valid, that the existence of a record of a pre-existing indebtedness becomes a matter of importance.

Turning now to the Sutliff case and taking the syllabus of the official report as our guide, we find the doctrine of that case to be as follows: "Where the Constitution and a statute of a State forbid any county to issue bonds to such an amount as will make its aggregate indebtedness exceed a certain proportion of the assessed valuation of taxable property in the county, and the statute requires the County Commissioners to publish and to enter on the public records of the county semi-annual statements showing the whole amount of the county debt, a purchaser for value and before maturity of a bond issued in excess of the constitutional and statutory limit is charged with the duty of examining the record of indebtedness, and the county is not estopped by a recital in the bond that all the provisions of the statute have been complied with to prove, by the record of the assessment and the indebtedness, that the bonds were issued in violation of the Constitution."

Just here it may be noted that the purchaser is said to be charged with the duty of examining the record of indebtedness. It is not pretended in this case that such examination was made. It is simply asserted that such a record was not kept, and failure by the Commissioners to do their duty

in the keeping of the record does not excuse a purchaser from the duty of making an examination and inquiry for it. That he is required to do by law, and, failing to do it, he cannot shield himself behind the excuse that the record was not kept exactly as required by the law.

In the opinion, Mr. Justice Gray cites with approval the remarks of Mr. Justice Matthews in *Dixon County vs. Field* concerning the effect of the recorded assessments of valuations upon would-be purchasers of bonds:

“The amount of the bond issue was known. It is stated in the recital itself. It was \$87,000. The holder of each bond was apprised of that fact. The amount of the assessed value of the taxable property in the county is not stated; but *ex vi termini* it was ascertainable in one way only, and that was by reference to the assessment itself, a public record equally accessible to all intending purchasers of bonds, as well as to the county officers. This being known, the ratio between the two amounts was fixed by an arithmetical calculation. No recital involving the amount of the assessed taxable valuation of the property to be taxed for the payment of the bonds can take the place of the assessment itself, for it is the amount, as fixed by reference to that record, that is made by the Constitution the standard for measuring the limit of the municipal power. Nothing in the way of inquiry, ascertainment or determination as to that fact is submitted to the county officers. They are bound, it is true, to learn from the assessment what the limit upon their authority is, as a necessary preliminary in

the exercise of their functions and the performance of their duty; but the information is for themselves alone. All the world besides must have it from the same source, and for themselves. The fact, as it is recorded in the assessment itself, is extrinsic, and proves itself by inspection, and concludes all determinations that contradict it."

The one ground upon which it was held that the bonds in Chaffee County vs. Potter were not governed by the decision in Dixon County vs. Field was that the former did not recite the total issue, and, consequently, there could be no ascertainment whether the county had exceeded its power by a comparison of any one of the bonds with the assessment roll. "The case at bar," says Mr. Justice Gray, in the Sutliff case, "does not fall within Chaffee County vs. Potter, and cannot be distinguished in principle from Dixon County vs. Field or Lake County vs. Graham. The only difference worthy of notice is that in each of these cases the single fact required to be shown by the public record was the valuation of the property of the county, whereas here two facts are to be shown—the valuation of the property and the amount of the county debt. But, as both these facts are equally required to be entered on the public records of the county, they are both facts of which all the world is bound to take notice, and as to which, therefore, the county cannot be concluded by any recitals in the bonds."

We may here well say that the single fact required to be shown by the public record is the value of the property of the county, because

the recitals of the bond furnish all necessary remaining information. Notwithstanding this, both facts equally appear, and, as a consequence, the case of Sutliff vs. Commissioners, instead of supporting, must overthrow the conclusion reached by the Court of Appeals.

The stipulation of facts in the Sutliff case, so far as it relates to the publication and record of semi-annual statements of indebtedness, was based upon the identical conditions testified to in this case. If Sutliff was bound by these statements, *a fortiori*, should Dudley be, for Sutliff represented bonds far below the constitutional limit of liability and unaffected, therefore, by the record of assessed valuations. Dudley, on the other hand, represents a bond issue far in excess of such valuation and invalid irrespective of the question whether any additional indebtedness existed or not. The Supreme Court has declared the county not estopped as to recitals in the Sutliff bonds and which are, consequently, invalid. The Court of Appeals estops the county from questioning the validity of the Dudley bonds and declares them to be valid, subsisting obligations. Both were authorized at the same time, under the same circumstances and in the same manner. Sutliff was a conceded *bona fide* purchaser. Dudley is neither purchaser nor owner, *bona fide* or otherwise. The application of the principle in Sutliff's case to this one must have resulted in the defeat of the bonds. Shall the county's liability depend upon the construction given by the Court of Appeals to the Sutliff case, or upon the case itself?

In *Millerstown vs. Frederick*, 114 Pa. St., 435, it has been held that, even though a statement required to be kept by public officials is not so kept, a purchaser of bonds will, nevertheless, be deemed to have had sufficient knowledge of what should have appeared in such statements, had they been properly kept. This principle is sanctioned by *Dillon on Municipal Corporations*, Section 529 a, and seems to be justified by this honorable Court in the case of *Doon Township vs. Cummins*, 142 U. S., 366, where it is said that "It would be inconsistent alike with the words and with the object of a constitutional provision framed to protect municipal corporations from being loaded with debt beyond a certain limit, to make their liability to be charged with debts contracted beyond that limit depend solely upon the discretion or honesty of their officers."

In *Buchanan vs. Litchfield*, 120 U. S., 292, it is said that if no assessed valuation were taken by the proper officials of the city, the actual valuation of the property could be gathered from the State and county taxes from which, in connection with a map of the city, the amount of property within its corporate limits could be ascertained.

This is, in effect, saying that a purchaser of bonds must take the best evidence which the records afford, and if it becomes necessary to do so, he must compare assessments filed for other purposes with a map of the city, and thus ascertain the taxable amount of property within its limits. If this be sound doctrine—and there can be no doubt that it is—then the semi-annual statements

kept by Lake County would be evidence of a compliance with the requirements of the statutes of Colorado upon this point, even though they had not been made public or recorded in strict accordance with the requirements of the law. Those introduced, however, are not imperfect in any essential particular. They indicate with perfect accuracy the amount of the indebtedness of Lake County at the time when they assumed to state it, and that is the essential fact of which would-be purchasers of the county securities must take notice. But the honorable Court of Appeals assumes in the face of the record that these semi-annual statements were not made or kept, and from that assumption the majority opinion draws the hasty conclusion that there was nothing in such records of which Dudley was bound to take notice, and then, losing sight of the record of assessed valuations, on the other hand, declares that the facts in the Sutliff case are so essentially different from those in this one as to make it wholly inapplicable. In other cases, that Court, following more closely the opinions of this one, has declared the rule generally to be that purchasers are bound to take notice of all the public records of the State which may have any bearing upon the authority of a county to incur a debt.

Coffin vs. Commissioners, 57 Fed. Rep.,
137.

It has also in the case of The National Life Insurance Company vs. The Board of Education, 62 Fed. Rep., 791, clearly stated the general doctrine of estoppel by recitals as determined by

this honorable Court, although its application of that doctrine to constitutional as well as statutory limitations should not be accepted as final. In that case the Court of Appeals has said:

“From the decisions to which we have referred, we think the following rules are fairly deducible:

“Recitals in municipal bonds that all the requirements of the laws with reference to their issue have been complied with, will not estop the municipality from proving, as against a *bona fide* purchaser, that the representative body had no power to issue them, where no act of the representative or constituent body could make the issue lawful at the time it was made, and this fact appears from the Constitution and statute under which the bonds were issued, the public records referred to therein, and the bonds the purchaser buys.”

Applying this conclusion to the case at bar, it would seem that the fact that a representative body had no power to issue the bonds in question appears from the Constitution and the statute under which the bonds were issued, from the public records referred to therein and from the bonds which the purchaser pretends to have bought.

The other conclusion announced by the Court of Appeals in the case last cited is that “Such a recital may constitute an estoppel in favor of a *bona fide* purchaser, even where the body that issued the bonds had no power to issue them, and could not, by any act of its own or of its constituent body, make a lawful issue of the bonds, if that fact does not appear from the bonds the purchaser

buys, the Constitution and statutes under which they were issued, and the public records referred to therein."

No process of reasoning with which we are familiar can bring the bonds in suit within the rule last announced without ignoring and disregarding, as we claim the majority of the Court of Appeals has done, the salient, prominent and indisputable facts which the transcript shows to have appeared of record concerning the financial condition of Lake County at the time of their issue and which facts presumably were actually known to Rollins as the result of his personal investigation.

In the case of The National Life Insurance Co. vs. Board of Education, just cited, the honorable Court of Appeals declared their understanding of the doctrine of the Sutliff case to be far different from that announced herein. On page 789 of the report, Judge Sanborn says:

"In Sutliff vs. Commissioners, *supra*, the Constitution and the statute limited the power of the County Commissioners to incur debts for the county to a certain percentage of the assessed valuation. *They had incurred indebtedness in excess of that limitation before any of the bonds were issued.* The statute required the County Commissioners to publish and to make a public record of a true statement of the indebtedness of the county semi-annually, and the Court held that purchasers of the bonds *must take notice of the Constitution, the assessed valuation and the public record of the debt referred to in them*, which together disclosed the entire absence of power in the Commissioners to is-

sue any bonds, and that no recitals in the bonds themselves would estop the county from proving these facts.

"The other cases cited above rest upon the same principle. In each of them the bonds failed, not because the municipal representatives who issued them failed to exercise the power they had in the manner prescribed, but because they had no power to exercise and the Constitution, statutes and public records referred to therein gave notice to the purchasers of this want of power."

The honorable Court of Appeals, for the evident purpose of bringing the bonds in suit entirely without the boundaries of the decision in the Sutliff case, says in its majority opinion that "The debt created by the bonds in this case was incurred, not at the time the Board of Commissioners determined that it was necessary, nor when the qualified voters of the county gave authority to incur it, nor on the date of the bonds, they having been antedated, but at the date, later than September 6, 1880, when the bonds were, in fact, issued and sold. The bonds recite that the whole issue is \$50,000 and this recital was notice to purchasers of the bonds of the creation of an indebtedness of the county to that amount. The assessed valuation of the taxable property of the County of Lake, according to the assessment which was completed by equalization on September 1, 1880, was \$11,124,489. This assessed valuation, in view of the vote authorizing the creation of the indebtedness, would admit of a lawful aggregate of indebtedness of that county to the extent of up-

wards of \$66,000. So that the recited amount of that issue of bonds was not of itself notice to a purchaser that the lawful aggregate limit of indebtedness had been passed, even if such purchaser was bound to take notice of the assessed valuation of the taxable property of the county."

• Waiving any consideration of the remarkable doubt expressed in the above quotation as to the necessity of a purchaser taking notice of the assessed valuation of the county, and waiving for the moment the question of what amount of debt which in any one year could be created by loan under the Constitution, we respectfully submit that the statement embodied in this quotation is utterly and palpably fallacious. There is nothing upon the face of the bonds to indicate to any purchaser that they were issued subsequent to the date they bore, to wit, July 31, 1880. The date of the coupon accompanying each bond is April 1, 1881, and the same date for over twenty years thereafter. A purchaser of the bonds takes them with notice of all existing conditions at the date thereof. On the 31st day of July, 1880, the assessed valuation of the county was \$3,485,628. Its total aggregate debt-creating capacity at that time, for all purposes, was \$12 per \$1,000, or less than \$42,000 in all.

Any purchaser, therefore, taking one of the bonds and comparing it with the assessed valuation of taxable property of the county would, in the language of Justice Matthews, be apprised of the fact of the amount of the issue, the amount of the assessed value of taxable property, being *ex vi termini*, ascertainable in one way only, to wit, by

reference to the assessment itself, a public record accessible to all intending purchasers, as well as the county officers, the ratio between the two amounts so fixed being an arithmetical calculation.

Since, therefore, it became necessary for his Honor, Judge Lochren, to insert a date later than September 6th in a bond bearing date July 31st, previous, in order to escape the doctrine of Dixon County vs. Field, it would seem too plain for argument that if this feature of the opinion is eliminated from it, the case of the plaintiff must fall to the ground. This becomes especially apparent when it is remembered that for the year 1880, and under that valuation, bonds could be constitutionally issued to the amount of \$16,686 and no more.

But the conclusion of the Court of Appeals, as stated in the second paragraph of its opinion, is an apparent *non sequitur*. It is as follows:

"The Court, therefore, erred in overruling the plaintiff's objections to the County Clerk's account book, the warrant register, and the proof of publication of financial statements. None of this evidence was material, as none of it constituted constructive notice to a *bona fide* purchaser of the bonds."

This necessitates some reference to the facts and to the statute of 1877. The facts are that one semi-annual statement of the financial accounts of the county, to wit, that of January 1, 1880, *was published and recorded*. The other statements were *recorded* and probably published, although no testimony to that effect was offered. They were recorded in a book kept for that purpose and called

the Clerk's account book. They bore date the 1st of January and 1st of July of each year. They constitute a public record. They gave to the world information concerning the actual condition of the county's financial affairs. The statute does not require that the Clerk shall designate his book of statement by any particular name. It is a book which shall be open to public inspection during business hours. It is one which would be exhibited upon inquiry therefor, just as would any other book forming a part of the public records of the county. This being true, it would seem to follow that mere irregularities in the preparation or record of the county's financial condition would be immaterial. So, also, would be the fact of publication. That is, presumably, intended for the information of the taxpayer, and not the dealer in public securities. It is the permanent record which is constantly open to inspection, and if that be made, its previous publication is wholly immaterial. For were it otherwise, a purchaser having actual notice of a record of a semi-annual statement and of all that it contained would be unaffected by the consequences thereof unless it should be shown that such statement prior to the record was published. The law does not require needless things. If my deed for real estate should be recorded among chattel mortgages instead of other deeds, it would be no less a record to the world, and this, although the statute should require that it be recorded elsewhere. The taxpayer should not be injured by the neglect of a public officer who has in part performed his duty, any

more than the purchaser of bonds should be protected as a *bona fide* holder because such officer has in part neglected it. Why this evidence was not material, why none of it constituted constructive notice to a *bona fide* purchaser of bonds, passes comprehension.

We have already adverted to the fact that the act of March 24, 1877, was one concerning counties, county officers and county government generally. Section 30, which requires publication and record of all semi-annual statements, was no more enacted in connection with those sections of that act relative to the issue of bonds than were the other sections relative to other affairs. Section 42 of that act provides, among other things, that it shall be the general duty of the Clerk of the Board of Commissioners to sign all orders issued by the Board for the payment of money and to record in a book to be provided for that purpose the receipts and expenses of the county. Section 44 provides that every order issued for the payment of money by the Clerk shall be numbered, and the date, amount and number of the same, and the name of the person to whom it is issued, shall be entered in a book kept by him in his office for that purpose. Section 112 requires the County Treasurer to "have and keep in his office a book to be called the registry of county orders, wherein shall be entered and set down at the date of the presentation thereof and without any interval or blank line between any such entry and the one preceding it, every county order or other certificate or evidence of county indebted-

ness at any time presented to such County Treasurer for payment, whether the same is paid at the time of presentation or not, the date and number of such order, the amount for which the same is payable, the date of the presentation thereof, the name of the person to whom such order is, by the terms thereof, payable, and the name of the person presenting the same. Every such registry of county orders shall, at all reasonable hours, be open to the inspection and examination of any person desiring to inspect or examine the same."

An examination of this registry will enable any one by a simple calculation to ascertain the extent of outstanding county indebtedness. It is an extension of which the semi-annual statement is a summary. Like the statute providing for the semi-annual statement, it is declared to be open to the inspection and examination of any person desiring to look at it. It is a public record to every intent and purpose, as complete, as solemn and as binding as the record of the semi-annual statement itself. By what process of reasoning it can be said that the record provided for in Section 30 constitutes notice to the world of what it contains, while that provided for by Section 112 of the same act does not constitute such notice, we cannot understand. No reason assigned by Mr. Justice Gray for the conclusion of this Court in the Sutliff case as to the semi-annual statements, is inapplicable to the warrant registry. We introduced both, from each of which the enormous amount of the county indebtedness appears. We introduced them under the principles of previously recorded

decisions. We insisted then, and insist now, that each is binding upon Mr. Dudley and all others dealing with the bonds in suit, and that the Court of Appeals committed reversible error in declaring such testimony to be immaterial.

The third paragraph of the opinion of the Court of Appeals is devoted to a consideration of the question whether the constitutional limitation upon loans to be made in any one year is or is not directory, and whether a disregard of its provisions by the Commissioners makes the bond issue itself within the limit of aggregate indebtedness valid in the hands of a *bona fide* holder. It is well said to be a question not suggested by the answer in the case. With equal truth it may be said to be one appearing in the case at first hand from the Court itself. We contend that if there be any one provision of the Constitution of the State of Colorado which has been settled by judicial construction beyond peradventure, both by State and Federal tribunals, it is Section 6 of Article XI. We will not weary this honorable Court by calling attention to its own decisions upon the subject, or by quoting from the *People vs. May*, in 9 Colo., in opposition to the views entertained by the honorable Court of Appeals. We content ourselves by asserting the indisputable fact that every Court which has considered the proposition has declared the limitation of the Constitution upon the amount of indebtedness by loan which any county could create in any one year to be mandatory, and, with the solitary exception of the opinion now under criticism, no Court at any time or under any cir-

cumstances has ever reached a contrary conclusion. To hold that this provision is merely directory, especially in view of the phraseology of the clause, is to set a precedent, which, consistently applied, will justify Courts in holding the entire section to be directory. If the limitation upon the county indebtedness to be annually created is a mere declaration of the constitutional convention which county officers may observe or not at their pleasure, then the limitation placed upon the aggregate indebtedness which a county may create is equally to be observed or disobeyed with like impunity. This is one of the most serious features of the decision, and, unless overthrown by the contrary conclusion of this honorable Court in the particular case, must be made the entering wedge of a series of official misconduct and consequent public liability, the ultimate effects of which it is extremely difficult to foresee.

The Supreme Court of Colorado, at the September term, 1895, was called upon by the Governor of the State to give a construction of Section 3 of Article XI. concerning State indebtedness. That part of Section 3 which is important is as follows: "The State shall contract no debt by loan in any form, except to provide for casual deficiencies of revenue, suppress insurrection, etc. And the amount of the debt contracted in any one year to provide for deficiencies of revenue shall not exceed one-fourth of a mill on each dollar of valuation of taxable property within the State, and the aggregate amount of such debt shall not at any time exceed three-fourths of a mill on each dollar of

said valuation until the valuation shall equal \$100,000,000 and thereafter such debt shall not exceed \$100,000."

"Our conclusion," said the Supreme Court, "is that the State has, by Section 3 of Article XI. of the Constitution, the power to contract a debt by loan for casual deficiencies of the revenue, which debt under the present circumstances may aggregate though not exceed \$100,000, but being limited in the amount of the debt to be contracted in any one year to one-fourth of a mill on each dollar of valuation of taxable property, and may, during the present fiscal year, upon the basis either of the assessment of 1894 or 1895, lawfully issue its bonds under this act to provide for a casual deficiency in its revenue in the sum of \$50,000, and during any subsequent fiscal year, an additional amount of \$50,000."

That is to say, that the power to contract such a debt is subject to the limitations. First, that the amount in any one year shall not exceed one-fourth of a mill on each dollar of valuation, and, second, after the valuation exceeds \$100,000,000, its total aggregate amount contracted by loan shall not exceed \$100,000 for casual deficiencies.

In *Hedges vs. Dixon County*, 150 U. S., 182, this honorable Court, Mr. Justice Harlan dissenting, declares that "Recitals in bonds issued under alleged authority may estop a municipality from disputing their authority as against a *bona fide* holder for value, but when municipal bonds are issued in violation of a constitutional provision,

no such estoppel can arise by reason of any recitals contained in the bonds."

In *Nesbitt vs. The Riverside Independent District*, 144 U. S., 610, Mr. Justice Brewer declares that "When the Constitution of a State forbids county, political or other municipal corporations within the State to become indebted in any one year beyond a named percentage of the value of the taxable property within said county or corporation, negotiable bonds issued by such corporation in excess of such limit are invalid, without regard to any recitals which they contain."

But in the opinion of the honorable Court of Appeals, "It would be singular indeed if, after authorizing a county upon vote of its qualified electors to create a specific indebtedness for the erection of necessary public buildings, the same provision should cripple the power to erect such buildings by requiring that the long time bonds authorized should only issue and be sold in small installments, making the county wait perhaps a series of years before getting enough money to warrant it in beginning the erection of the necessary public buildings, paying, in the meantime, interest on the early bonds, the proceeds of which would be lying idle awaiting the accumulation of enough to begin with. No grammatical construction of the sentence nor any sound reasoning justifies the importation into the last clause of the section of the restriction in the first clause as to the amount of debt by loan which can be created in any one year."

With the practical effect of the section we have nothing to do. It is sufficient to say that the

constitutional convention in its wisdom saw fit to impose this limitation upon the debt-creating powers of County Commissioners, and experience has demonstrated its necessity. Whether public improvements could not be made or made under difficulties and with increased expenses unless the restriction be disregarded, is wholly immaterial. "No county," says the Constitution, "shall contract any debt by loan in any form except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges, and such indebtedness contracted in any one year "shall not exceed the rates upon the taxable property in such county following," etc. If the lawful and grammatical construction of this clause does not justify the conclusion that it was intended as an absolute limitation upon the borrowing capacity of any county in any one year, we might well pause and ask what it does justify. We find in another part of the section the clause that the aggregate amount of indebtedness of any kind for all purposes, exclusive of debts, etc., shall not at any time exceed twice the amount above herein limited, etc. Does not the grammatical construction of this clause equally lead to the conclusion that it is merely directory? If the limitation is removed as to the annual indebtedness, why does it not disappear from the clause concerning the aggregate indebtedness when the same reasoning is applied to it?

But if the Court of Appeals is correct, why limit the debt by loan to the mere purpose of erecting necessary public buildings or making and re-

pairing public roads and bridges? Is not this limitation equally directory? Why cannot the debt by loan be created for some other public purpose? Or, indeed, for some private purpose, provided its character does not appear upon the face of the bonds? Where shall we stop when once the restrictive character of the constitutional provision is removed? Why not issue millions in bonds without regard to the restriction upon the aggregate amount permitted? Why submit the question to a vote of the people at all? Paraphrasing the opinion, we might say that "It would be singular indeed that a county needing a Court House which could not be built at an expense of less than a million dollars should be defeated by a provision requiring that the long-time bonds authorized could only amount, in the aggregate, to \$100,000, making the county wait perhaps a series of years before getting enough money in addition by taxation and otherwise to warrant it in beginning the erection of necessary public buildings and be paying in the meantime interest on the early bonds." Let us suppose that the Commissioners of Lake County had caused an election to be held in 1879 upon a resolution declaring the sum of \$100,000 necessary for public improvements. Suppose, also, that this sum in bonds had been issued in one year, might not the honorable Court of Appeals with equal propriety say that the issuance of these bonds in the same year was a mere irregularity and that the total issue, though beyond the sum mentioned in the Constitution as power of the Commissioners to create for any purpose, was also

an irregularity, the grammatical construction of the clause justifying the conclusion that it was not restrictive, but merely advisory?

Another and serious criticism is that the Court assumes that the total amount of the bonds, with other indebtedness, does not appear to be in excess of the total aggregate indebtedness which might be created. We utterly and absolutely deny that the \$50,000 in bonds, when added to the amount of indebtedness clearly appearing to have existed at the time of their issue, is within the extreme constitutional limitation. Indeed, the effect of the opinion of the Court is virtually to annul every restriction placed upon the debt-creating power of counties by the Constitution of Colorado, and to say, in effect, that if bonds are issued apparently regular upon their face, the mere restriction upon the amount of the indebtedness of the county is, at best, an irregularity if the bonds are in the hands of a *bona fide* holder.

We take issue, also, with the assertion of the honorable Court of Appeals that the legislative construction of this section of the Constitution, as shown by Section 21 of the act of March 24, 1877, conforms to the views here expressed. That part of the section referred to is a proviso which declares "that the aggregate amount of indebtedness of any county, exclusive of debts contracted prior to July 1, 1876, shall not be in excess of a certain ratio, to wit, counties in which the assessed valuation of property shall exceed \$5,000,000, \$6 on each thousand thereof; counties in which the assessed valuation of property shall be less than

\$5,000,000 and exceed \$1,000,000, \$12 on each thousand dollars." This is the statutory construction of that part of the constitutional section which refers to a total aggregate indebtedness, and is in no sense any attempted construction of the section concerning annual indebtedness. It was also printed upon the back of every bond here in controversy and is important in that it expressly warned the purchasers thereof that the bonds were only valid provided the limit of aggregate indebtedness had not been reached. The fact is stated in the fourth paragraph of the opinion that the County of Lake received full consideration for its bonds and ratified them by paying the interest upon them as it matured for several years. This, it is said, estops the county from asserting any irregularity. That would be true if we were complaining of irregularities merely. It is not true, if our contention is correct, that the bonds are absolutely void. This proposition has been stated so frequently by this honorable Court that it is scarcely necessary for us to do more than call attention to a few of the authorities upon the proposition.

Morton vs. Evansville, 25 Fed Rep., 382, cited in the opinion, is clearly in support of the proposition that a void bond cannot be subject to ratification.

Martin vs. Fulton, 10 Wallace, 676.

Kelley vs. Town of Milan, 127 U. S., 137.

Loan Association vs. Topeka, 20 Wallace, 655.

Supervisors vs. Schenck, 5 Wallace, 772.

Litchfield vs. Ballou, 114 U. S., 190.

Hedges vs. Dixon County, 150 U. S., 182.

It seems difficult to refute the reasoning of judge Thayer in the brief, but vigorous dissenting opinion which accompanies the decision of the Court. He very properly declares that the limit of annual indebtedness placed by the Constitution upon counties and States is mandatory and cannot be disregarded with impunity. This, he says, is the construction of *Lake County vs. Rollins* and *The People vs. May*, and is sustained by the language of the instrument and the probable motive of the law maker. Such being his interpretation of the constitutional provision, and each bond showing on its face that the aggregate debt thereby created in a single year was \$50,000, the extent to which such a debt could be created being limited to about \$16,500, the plaintiff below cannot pose as an innocent purchaser of the bonds in suit but must be affected with knowledge of the want of power in the county to issue them.

III.

It seems to follow from what has been said that the decision of the Court of Appeals in this case is in conflict with the decisions of this honorable Court upon the same subject and prescribes a rule for the enforcement of an alleged pending indebtedness not only not recognized, but heretofore repudiated by this honorable Court. Conflict of judicial opinion is to be deplored at all times. In a case like this, it must result not only in expensive and drastic litigation, but ultimately in the en-

forcement against the counties of Colorado of obligations which, by the judgment of this honorable Court, are not valid and subsisting claims against them. Besides, the construction given the Constitution in this case is a dangerous one, utterly irreconcilable with the terms of the instrument and obnoxious to all decisions of the Court upon the subject. Every motive which prompted Congress to provide for the review of cases by *certiorari* conspires to demand the exercise of the right here. The Dudley case should be governed by the Sutliff and other cases determined by this honorable Court, or this Court itself should announce wherein it so differs as to make those cases inapplicable to it. Not until then will complete justice be done between the contending parties. The importance of the propositions involved is obvious, and further discussion seems to us unnecessary.

IV.

In conclusion, we may be pardoned for suggesting that even though this Court should concur in the view expressed by the Court of Appeals as to the soundness of the pretended assignment to him of the bonds in question, yet, inasmuch as the action is upon certain coupons long past due, that circumstance of itself should be given great weight as bearing upon the question of *bona fides*. Coupons are separate and distinct promises to pay; they may be severed from the bond and negotiated independent of it. They are said to be given as a convenient mode of obtaining payment of interest,

and are so attached to the bond that they may be cut off as a matter of convenience in collection, or to enable the holder to realize the interest due or to become due by negotiating the coupons.

City of Kenosha vs. Lamson, 9 Wall., 482.

It may be added that, inasmuch as they draw interest after maturity, they constitute a separate contract, because of the advantage thus given to the bondholder. Being a mere promise to pay and negotiable like any other promise to pay, they are subject in the hands of the purchaser after maturity to any equities which existed against the original holder. The presence of overdue coupons, coupled with other indications of invalidity, is sufficient to put a purchaser on inquiry.

Parsons vs. Jackson, 103 U. S., 762.

In this case the plaintiff was the unconscious assignee of the bonds and coupons in suit under assignments made in 1885. He knew nothing of the fact until 1894 and long after suit brought. The suit was instituted by the same parties transferring the bonds to him. Some of the coupons in suit are barred by the statute of limitations. Mr. Dudley bringing suit in 1892, upon coupons running backward for a period of six years, should be held to be the purchaser of said coupons, if at all, at the time when he became informed of the fact. This being true, the equities, if any, attaching to the county as against the said bonds in the hands of their original holders are equally enforceable against Mr. Dudley in this action, independent of the question of the legal effect of the

pretended assignment in transferring the title to him.

It may not be out of place to remind the Court of the curious fact that if the decision of the Court of Appeals in this case is permitted to stand, \$5,000 of the bonds issued by the same Board of Commissioners under the same authority, pursuant to the submission of the same question at the same time to the voters of Lake County, will have been held invalid by this Court, while \$50,000 of such bonds, so issued, will have been approved and validated by the Circuit Court of Appeals. Such a consequence of litigation is, to say the least of it, unfortunate, and cannot but increase the already too widespread conviction that justice is unreliable and the judgments of Courts altogether uncertain.

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No. 177.
Office Supreme Court U. S.
FILED

DEC 5 1898

JAMES H. MCKENNEY,
Clerk.

Ex. of Thomas & Bryant for Pet
In the Supreme Court of the United States.

Filed Dec. 5, 1898.
October Term, 1898.

THE BOARD OF COUNTY COM-
MISSIONERS OF LAKE COUNTY,
Petitioners,

vs.

HARRY H. DUDLEY,
Respondent.

No. ~~177~~ - 177-

*Writ of Certiorari to the Circuit Court of Appeals for
the Eighth Circuit.*

Brief and Argument for Petitioner.

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In the Supreme Court of the United States.

October Term, 1898.

THE BOARD OF COUNTY COM-
MISSIONERS OF LAKE COUNTY,

Petitioners,

VS.

HARRY H. DUDLEY,

Respondent.

No. 173.

*Writ of Certiorari to the Circuit Court of Appeals for
the Eighth Circuit.*

Brief and Argument for Petitioner.

I.

STATEMENT OF FACTS.

Most of the facts in this case have been before this Court upon at least three occasions, and will be found reported in *Graham vs. Lake County* and

Rollins vs. Lake County, in 130, U. S., and in Sutliff vs. Lake County, 147, U. S.

On October 7th, 1879, the people of Lake County, Colo., voted upon the proposition of incurring a bonded indebtedness. A majority of the votes cast were in favor of the indebtedness, and bonds to the amount of \$55,000 were issued. Although the creation of the debt was one act, the bonds were divided into two classes, and issued at different times and under two different names. The first lot for \$50,000 raised money for public buildings; the second lot for \$5,000 secured money for roads and bridges.

The county paid interest coupons for two or three years and then defaulted. Suit was shortly afterwards brought upon coupons cut from the smaller issue of \$5,000 and finally reached this Court, which decided, after full argument, that the county had no authority to incur a bonded indebtedness of \$5,000, for the reason that at that time it had already accumulated an indebtedness beyond the amount fixed as the utmost limit by the constitution of Colorado.

Sutliff vs. Lake County, 147 U. S., 230.

In the case at bar, the Court of Appeals for the Eighth Circuit, upon practically the same state of facts, has held that the \$50,000 bond issue made at practically the same time is a valid indebtedness and within the constitutional limit. Judge Thayer filed a strong dissenting opinion.

The facts of the case are practically undisputed. Harry H. Dudley, a citizen of New Hampshire, brought suit as the owner of coupons cut from the public building bonds. The county defended the suit upon two grounds, first, that Dudley was not a *bona fide* holder of the coupons, and second, that the bonds were illegal and void, because under the provisions of Section 6 of Article XI of the Constitution of Colorado and of the statutes then in force and printed on the back of each bond the county was without authority to incur the indebtedness. The case was tried three times in the Circuit Court for the district of Colorado, once before his Honor Judge Hallett, and twice before his Honor Judge Riner. Both judges were of the opinion that the indebtedness was illegal, and beyond the constitutional limit. In the last trial Judge Riner directed a verdict for the defendant. The case was taken by writ of error to the Circuit Court of Appeals. Two of the judges of that Court decided in favor of reversing the judgment and one in favor of sustaining it. So that out of the five judges who have passed upon the case, before it reached this Court, three have held the indebtedness to be invalid and two have held it to be valid. The facts of the case consist, for the most part, of the records of Lake County. They will be referred to at appropriate points in our argument.

II.

SPECIFICATION OF ERRORS.

This case being on *certiorari* to the Circuit Court of Appeals, there can be technically, we presume, but one error assigned, to wit: that the Court erred in reversing the judgment of the Circuit Court for the District of Colorado; but this involves the discussion of a number of propositions of law which appear from the record in the case, and our specifications of error, so far as this argument is concerned, will therefore consist of the discussion of the following propositions of law and fact.

First—The Court erred in holding that under the testimony in this case, Harry H. Dudley was a *bona fide* holder for value of the coupons in controversy and entitled to bring suit thereon.

Second—The Court erred in refusing to hold the bonds in controversy void, because they created a debt by loan in one year greater than that allowed by the Constitution of Colorado.

Third—The Court erred in holding that the semi-annual statements of indebtedness of Lake County, the bond and warrant registers and other public records of the county, were not relevant testimony under the issues and sufficient to put all purchasers of county indebtedness, upon notice as to the actual amount of outstanding indebtedness at the time the bonds were issued.

Fourth—The Court erred in holding that the

bonds in controversy were valid obligations of Lake County.

Fifth—The Court erred in holding that Lake County could, by receiving the benefits of and paying interest on the bond issue in controversy, validate the same.

These propositions will be discussed in the order indicated.

III.

ARGUMENT.

First.

The Court erred in holding that under the testimony in this case, Harry H. Dudley was a *bona fide* holder for value of the coupons in controversy and entitled to bring suit thereon.

This case was commenced on the 31st day of March, 1892. After reciting the manner in which the bonds were issued and the default in the payment of interest upon all coupons subsequent to those numbered one, two and three, the plaintiff declares that "he became the purchaser of said coupons before this action for a valuable consideration paid by him and, without notice of any claim at law or in equity affecting their validity." (Transcript, page 8.)

In its answer, the defendant declared, as to this allegation, that it had not and could not obtain sufficient knowledge or information upon which to

base a belief. Section 56 of the Colorado Code of Practice provides that "In denying any allegation in a complaint not presumptively within the knowledge of the defendant, it shall be sufficient to put such allegation in issue for the defendant to state as to such allegation that he has not and cannot obtain sufficient knowledge or information upon which to base a belief." And where the language of the section is conformed to in the pleading, the issue is said to be complete.

James vs. McPhee, 9 Colo., 486.

Haney vs. The People, 12 Colo., 245.

Pomeroy's Remedies and Remedial Rights, Sec. 640.

Both plaintiff and defendant assumed the title and *bona fides* of the plaintiff to be in issue. The plaintiff introduced George W. Wright and Edward W. Rollins, both of whom testified as to the plaintiff's ownership. Six bills of sale of various dates were also introduced in evidence in support of the claim.

Wright testified that Dudley was the owner and that he purchased the bonds for Dudley upon the latter's instructions, although he cannot remember having paid a cent for Dudley at any time. The bills of sale, with the exception of one, seem to have been made shortly after the county defaulted upon its coupons—the exception being Exhibit 3, dated December 5, 1888.

Mrs. Jones recites that for value received she

sold certain bonds and coupons to the plaintiff (Exhibit 3 and 7, pages 39-42, printed transcript).

Messrs. David Creary, J. H. Jagger, H. D. Hawley and L. C. Hubbard declared that in consideration of \$5,380.56 they made sale of seven bonds of the series (Exhibit 4, page 39).

The Nashua Savings Bank by its bill of sale acknowledges the receipt from Dudley of \$11,869.45 in payment of bonds 92 to 111, inclusive.

The Union Five Cent Savings Bank in Exhibit 6, in consideration of \$10,695 paid by Harry H. Dudley, sold to him bonds 112 to 129, and Joseph Standley acknowledges the receipt of \$15,887.50 from the plaintiff in consideration of the bonds by him transferred. (Transcript, pages 39-43).

There is nothing to indicate where these bills of sale were made, and it is fair to presume that they were made where the sellers resided. Mr. Rollins testified that Mr. Dudley is the present owner of the bonds, but on cross-examination does not know how or from whom he purchased them, and only knows that he is the owner because he sent the bonds to him with proper bill of sale to substantiate his claim. Mr. Rollins is the head of a corporation known as E. H. Rollins & Sons, dealers in municipal securities, and Mr. Dudley was one of the Directors. (Transcript, pages 45-47).

This constitutes the substance of the plaintiff's testimony as to the ownership of the bonds.

The defendants, suspecting the falsity of Dudley's claim to ownership and possession of the bonds, took his written deposition, which was filed on January 21, 1895, in which he carefully avoided any statement as to any payment of money by him for the bonds, but did say that he understood the bonds and coupons were transferred to him for the purpose of bringing the suit against the county to make it pay its honest debts. (Transcript, page 56.) In consequence of the ambiguous character of this deposition, the defendants took another, the last being upon oral instead of written interrogatories. From that deposition it conclusively appears that the answers to the first had been carefully written out for Mr. Dudley by his attorney; that the bonds mentioned in the bills of sale were still owned by the grantors therein mentioned; that the plaintiff did not even know that the bills of sale were made to him until the year 1894, or after they were nine years old; that he did not have possession of the bills of sale until 1894, and then but temporarily; that he never paid a dollar to any person whomsoever for any of the bonds or coupons; that all moneys which might be collected in the pending suit would be paid over to the owners of the bonds; that Mrs. Jones and Mr. Standley, two of his assignors, were citizens of Colorado; that the only interest which he has or had in the bonds or any of them consists of his interest as a stockholder in the firm of E. H. Rollins & Sons;

that he never told Wright to buy the coupons forming the subject of the suit, and, above all *that the bonds and coupons had never been delivered to him nor did he ever have them in his possession*, although he saw some of them in a safe in Boston in the year 1893, which was before he knew that such a thing as a bill of sale to himself had ever been made. Never having bought them, never having paid anything for them, never having been delivered to him, never having had them in his possession and having no knowledge of the pendency of the suit until the year 1894, or two years after the same was brought, he cannot be considered as a *bona fide* holder, either for value or otherwise, without doing violence to every principle which enters into the definition of the term. Nevertheless, in the face of such a record, the Court of Appeals declares that "the plaintiff *by the delivery to him of the coupons and written assignments thereof*, became the legal owner of such coupons and entitled to maintain an action upon them whether he had actually paid the former owners or not. Holding them by valid written transfers from former *bona fide* holders for value, he succeeded to all rights of such former holders. No defense is pleaded which makes it material whether the plaintiff under such circumstances did or did not pay value for the coupons."

The Circuit Courts of the United States are of limited and specific jurisdiction. If presumptions are to be indulged in cases of doubt, they are to be

construed against its existence, and any collusive or wrongful action made for the purpose of conferring it should be defeated.

It will be noticed that the Court of Appeals assumes that the coupons and written assignments had been delivered to the plaintiff. This is absolutely without foundation, since the plaintiff himself testifies that he never even saw the bonds but once, and that was before he knew he was their owner, and never saw the assignments but once in December, 1894. It has been decided that the Circuit Court has no jurisdiction where the nominal parties have been made so collusively to bring the controversy within its jurisdiction.

Marion vs. Ellis, 9 Fed. Rep., 367.

When parties convey land to a stranger, a citizen of another State, without his knowledge and without consideration, for the purpose of creating jurisdiction in the United States Courts, the transaction is only colorable and collusive and the suit must be dismissed.

Coffin vs. Haggin, 11 Fed. Rep., 219.

Fountain vs. Town of Angelica, 12

Ibid., 8.

The identical question has been determined by this Court in Lytle vs. Lansing, 147 U. S., 59. The facts in that case were not so strong as they are here. There the bonds were actually delivered to the plaintiff—not only so, but he claimed to have paid as a consideration an interest in a ranch

in Texas. This Court, quoting with approval the doctrine of *Wormley vs. Wormley*, that "It is a settled rule in equity that a purchaser without notice, to be entitled to protection, must not only be so at the time of the contract or conveyance, but at the time of the payment of purchase money," and refusing to recognize the claim that this principle has no application to the purchase of negotiable instruments like the bonds in question, declares that "It is impossible to avoid a conclusion that the purchases of the bonds were never made in good faith, but were merely fictitious, and that their real ownership is still in some one who is affected with notice of their invalidity and has endeavored by feigned transfers to get them into the hands of some one who can pose before the Court as a *bona fide* purchaser."

The position taken by this Court and by the Court of Appeals upon this subject cannot both be correct. One or the other must give way. *Lytle vs. Lansing* is in strict accord with both principle and authority and should prevail.

But the Court of Appeals declares that the plaintiff holding the bonds by written transfers from former *bona fide* holders for value, he succeeded to all the rights of such former holders. We contend that there is not a syllable of testimony in the record which supports the contention that the assignors of the plaintiff, either mediate or immediate, were *bona fide* holders of the bonds. It is not pretended that the Court House con-

tractor or Jones, the original purchasers, were either of them unaware of their invalidity. The original purchaser from the contractor says that he went to Lake County, examined into the circumstances, and thought the bonds were good. If he examined into the facts, he was informed of them, and his conclusion as to their effect upon the bonds cannot be the accepted standard of their validity. What he thought or failed to think is of no possible consequence. Inasmuch as Mr. Rollins did not descend into particulars and tell the jury what he did or did not examine, it is right to assume that he knew what the indebtedness of the county was, what its assessed valuation was, and what were the limitations upon the debt-creating capacity of the county at the time of their issue. Mr. Rollins bought \$30,000, worth of the bonds and says that he sold them as soon as he could. Whether he sold them to the immediate assignors of Mr. Dudley or to some one else does not appear. Whether he sold them to any one without telling them all he knew of the facts is equally uncertain. But if, as a fact, Mr. Rollins assured the vendees that the bonds were good at the time of his transfer to them, he would doubtless have said so. It is not possible, however, to justify the conclusion of the court as to the *bona fides* of the ownership of Dudley's pretended assignors without assuming that because the record is silent upon an important question, which is made an issue in the case, the issue is, therefore proven.

If the decisions of this honorable court concerning the effect of certain recorded facts upon the *bona fides* of any holder, whatever is actual knowledge may have been, is to determine the rights of the parties here, then the question of the *bona fides* of Dudley's vendors is wholly immaterial.

But the Court proceeds to say that no defense is pleaded which makes it material whether the plaintiff, under such circumstances, did or did not pay value for the coupons, and—

Sheridan vs. Mayor, 68 N. Y., 30, and
Commissioner vs. Bolles, 94 U. S., 104,

are cited in support of this conclusion.

The case of Sheridan vs. The Mayor decides that a plaintiff suing upon an assigned claim is the real party in interest under the Code. If he has a valid transfer against the assignor and holds the legal title to the demand, the defendant has no legal interest to inquire whether the transfer was an actual sale or merely colorable, or whether a consideration was paid therefor. The action was brought originally by one Morgan Jones, upon an account for work done for and materials furnished to the defendant, and the claim was assigned to Sheridan by Jones, after which Sheridan, was substituted as plaintiff. The Court declares that the plaintiff is the real party in interest if he has a valid transfer, as against the assignor and holds a legal title to the demand; that it is not of any mo-

ment that no consideration was paid for the demand by the assignee, since the assignor could give it to the plaintiff, or sell it to him for an adequate or without any consideration.

It will be noticed, first, that the question of the rights of an alleged *bona fide* holder, as contrasted with those of an original holder, were not there in controversy. Then, too, the assignment of the cause of action was made pending the litigation, consisted of an open account instead of a negotiable instrument. The question of jurisdiction was also absent from the controversy, whereas, here *bona fide* ownership in a non-resident is essential to the jurisdiction of the Circuit Court of the United States as against a citizen. The two cases are in no respect parallel to each other.

The case of the Commissioners vs. Bolles, 94 U. S., does not seem to be apposite to the question under consideration, and neither of them can or does, in any wise, affect the doctrine of Lytle vs. Lansing.

The Court of Appeals further declares that the second instruction asked for by the plaintiff was correct, and the refusal of the trial Court to give the same was error. That instruction is as follows:

"The Court instructs the jury that the plaintiff in this case, Harry H. Dudley, being a non-resident of the State of Colorado, and a citizen of the State of New Hampshire, as appears by the evidence in this case, had a legal right to purchase the bonds and coupons in question, for the purpose of enforcing the same by this action, and such pur-

chase, as shown by the evidence in this case, is lawful and valid and operated to transfer the legal title of said bonds and coupons to him."

That Mr. Dudley had a legal right to purchase the bonds and coupons in controversy, does not admit of question. But we emphatically deny that any purchase, valid or otherwise, was shown by the evidence in this case to have been made to him. If that instruction is correct, and such a transaction makes Mr. Dudley a *bona fide* purchaser of the bonds in suit, then the law, as heretofore administered, has been very much misunderstood.

If the instruction prayed for and refused correctly stated the law, then this Court in *Lehigh Mining and Manufacturing Co. vs. Kelly*, 160 U. S., 327, misstates it. In the case cited it appeared from the agreed statement of facts that the land in controversy had been claimed by a Virginia corporation prior to March 1, 1893, on which date it executed and delivered a conveyance thereof to the Lehigh Company, a Pennsylvania corporation, in fee simple; that the Pennsylvania Company was organized by the individual stockholders and officers of the Virginia Company, and the conveyance was made to it to give the Court jurisdiction, but that the conveyance passed to the Lehigh Company all of the right, title and interest of the Virginia Company, since which time the latter never had any interest therein. Such a conveyance was held insufficient to invest the Lehigh Company with the power to wage a suit in the

Federal Court, and the reasoning of the case is unanswerable.

"The arrangement," says Mr. Justice Harlan, "by which, without any valuable consideration, the stockholders of the Virginia corporation organized a Pennsylvania corporation and conveyed these lands to the new corporation for the express purpose—and no other purpose is stated or suggested—of creating a case for the Federal Court, must be regarded as a mere device to give jurisdiction to a Circuit Court of the United States and as being, in law, a fraud upon that Court, as well as a wrong to the defendants. Such a device cannot receive our sanction."

If, in the case at bar, the pretended transfer to Dudley was not for the express purpose of creating a case for the Federal Court, it must have been for the additional purpose of putting forward a pretended *bona fide* holder of the bonds against the county. If this be true, one device is as fraudulent as the other, and both united cannot lawfully effect the purpose had in view.

The decision complained of is equally obnoxious to the doctrine of *Farmington vs. Pillsbury*, 114 U. S., 138. That, like this, was a suit upon coupons of municipal bonds. The State Court in Maine had decided that they were a nullity, after which coupons were gathered up and transferred to Pillsbury, a citizen of Massachusetts, under an arrangement by which he gave his promissory note for \$500, payable two years from date, with interest, and agreed, as a further consideration, that if he succeeded in collecting the coupons, he would pay the agent fifty per cent of the full amount collected above the \$500. He brought

his suit in the Circuit Court of the United States for the District of Maine. The Court declared the whole transaction to be a fraud; and Chief Justice Waite emphatically pronounced the suit to be one for the benefit of the owners of the bonds.

"They are to receive from the plaintiff one half of the net proceeds or the case they have created by their transfer of the coupons gathered together for that purpose. The suit is their own in reality, though they have agreed that the plaintiff may retain one half of what he collects for the use of his name and his trouble in collecting. It is true the transaction is called a *purchase* in the papers that were executed, and that the plaintiff gave his note for \$500, but the time of payment was put off for two years, when it was, no doubt, supposed that the result of the suit would be known. No money was paid, and as the note was not negotiable, it is clear that the parties intended to keep the control of the whole matter in their own hands, so that if the plaintiff failed to recover the money, he could be released from his promise to pay."

In the case at bar, the formality of executing a promissory note was not even considered. Dudley paid nothing and agreed to pay nothing. He did not even hire an attorney. Every cent to be collected by him goes to his alleged assignors and to no one else.

The fifth section of the act of March 3, 1875, (still in force) makes it the duty of the Circuit Court to dismiss a suit when it appears that the parties thereto have been improperly or collusively made or joined for the purpose of creating a case cognizable under that act. In *Williams vs. Nottawa*, 104 U. S., 209, the plaintiff brought suit upon bonds of the township of Nottawa, Michigan, a few of which he personally owned, the others having

been transferred to him by citizens of Michigan for purposes of collection. Judgment was rendered in favor of the township on the bonds so transferred and in his favor for the residue. Williams took the case to this Court, which not only declined to disturb the judgment for the township but reversed the judgment in his favor on his own bonds with directions to the Court below to dismiss the action. This it did on its own motions, the facts clearly showing the case to have been collusive and so far as the bonds owned by Kline and Connor are concerned, clearly within the prohibition. As the actual owners of the bonds were citizens of Michigan they could not sue in the courts of the United States, and Williams distinctly testifies that he received and held their bonds solely for purposes of collection with his own and for their account. It cannot for a moment be doubted that this was done for the purpose of creating a case for Kline and Connor cognizable in the Courts of the United States. That being so, it was the duty of the Circuit Court to dismiss the suit as to these bonds and proceed no further; for as to them the controversy was clearly between citizens of the same state, Kline and Connor being the real plaintiffs.

In the case at bar Dudley has not the merit of Williams in the other, for he is not and never was the owner of a single bond or coupon. This unconscious vendee in bills of sale, of which he knew nothing, this innocent owner of bonds never deliv-

ered, this plaintiff in a suit brought and pending for years without his knowledge, presents a flagrant illustration of the extent to which the doctrine of *bona fide* ownership can be carried in the effort to enforce the payment of void obligations. Not only are the plainest principles governing the ownership and custody of rights of action disregarded, but the Federal Statute has itself been deliberately violated by the real owners of the bonds and coupons in suit, and yet the Court of Appeals assures us that the plaintiff holds the bonds by writ.

In *Detroit vs. Dean*, 106 U. S., 537, a similar attempt to confer jurisdiction was declared by Mr. Justice Field to be "a mere contrivance, a pretense, the result of a collusive arrangement to create in favor of the plaintiff, a fictitious grant of Federal jurisdiction."

We are aware that it will be contended that but two of Dudley's assignors were citizens of Colorado, and hence, a transfer to him was not necessary for the purpose of giving the Federal Court jurisdiction of the case. This statement is an admission of our contention as to two of the assignors, and to that extent it is good. The only possible excuse, therefore, which can be used to justify the pretended transfer by the others is that a *bona fide* holder was necessary, and hence the pretended transfer without consideration, without delivery, and without knowledge on the part of

the assignee of the fact that the transfer was made

Since the rights of *bona fide* purchasers of invalid securities have been recognized and enforced by the Courts, men have resorted to many devices for the purpose of creating them. *Bona fide* holders have been made sometimes by feigned transfers to outside parties who have conveyed back to original holders. They have sometimes been invested with title to securities for the sole purpose of enabling their real owners to bring suits in the names of such holders, the proceeds of the suit coming direct to the real holders without reference to the name or character of the plaintiffs. Men have shut their eyes to the most obvious facts that they might testify to their innocence, and in many instances those intending to purchase bonds prior to their issue have systematized their conduct so as to enable them to assume the attitude of *bona fide* holders. These things are culpable enough, but what shall we say of a case like this where the plaintiff, without his knowledge, was invested with title to nearly \$100,000 worth of bonds and coupons for which he never paid a cent and of which he remained in ignorance for nine years afterwards, when no delivery whatever of the written assignments, bonds or coupons was made to him, and when suit was brought in his name for the recovery of the coupons matured, he being innocent of the fact for two years thereafter? Such conduct was the result of a deliber-

ate purpose, and that purpose we can readily conjecture. Such conduct robs him completely of any presumption of *bona fides*. It also clearly indicates that the actual owners of the bonds and coupons are not and never were *bona fide* holders, and, consequently, they felt impelled to make the transfer to Dudley or some one else that they might shield themselves behind his presumptive ignorance of all the facts which invalidated them. These circumstances clearly indicate that Roberts, the contractor, and Rollins, the purchaser, knew of the invalidity of the issue of these bonds, but concluded, nevertheless, to compel the county to pay under the plea that Dudley, the assumed owner, would be greatly wronged and outraged if the county should avoid responsibility to him. If the immediate grantors of Mr. Dudley were *bona fide* holders, no possible reason for the pretended transfer to Dudley can be imagined. They might have brought suit in their own names upon the coupons belonging to them and obtained judgment as well by reason of their own *bona fides* as by that of Mr. Dudley.

But two of his assignors, Mrs. Jones and Mr. Standley, were citizens of Colorado. They could not have waged this action in the Federal Courts. One of them, Mrs. Jones, heiress and executrix of the original purchaser of the bonds, was bound by any and all knowledge which she possessed of their invalidity. Their transfers were a palpable fraud upon this Court, intended solely and only to

enable it to adjudicate upon their claims, they being the actual owners and the transfer being utterly, absolutely and totally worthless.

It is significant that not one of the assignors was called upon by the plaintiff to testify either to the *bona fides* of their ownership or of their transfer to the plaintiff. From beginning to end, they have been silent. Is not this, therefore, a material issue, and one the evidence upon which clearly indicates, in the language of the opinion in *Lytle vs. Lansing*, that the purchases of these bonds were never made in good faith, but were merely fictitious, and that their real ownership is still in some one who is affected with notice of their invalidity and has endeavored by feigned transfers to get them into the hands of some one who can pose before the Court as a *bona fide* purchaser. This error, independent of all others in the case, is sufficient to invalidate the decision of the Court below and to justify at the hands of this Court a reversal of the judgment.

In *McLean vs. Valley County*, 74 Fed. Rep., 389, the plaintiff brought suit *inter alia* upon certain coupons from bonds of Valley County, belonging to Ball and others, which had been transferred to the plaintiff by delivery, for purposes of collection. Judge Shiras held that under the Nebraska statute requiring actions to be brought in the name of the real party in interest, the plaintiff could not recover as to such coupons. The Colorado statute, Code, Section 3, requires that every action shall be

brought in the name of the real party in interest, except as otherwise provided, and no further provision is made therein for cases like the one at bar.

This and other Courts have frequently held that a *bona fide* holder of municipal securities, entitled to protection as such, and capable of enforcing payment, notwithstanding the validity of defenses which might be urged against original holders or holders with notice, must be one who takes it *for value*, in good faith, before maturity. Unless these things exist as parts of the transaction, he is not a *bona fide* holder.

Nesbit vs. Riverside Co., 144 U. S.
Simonton on Bonds, 116, 193.

Mr. Dudley has parted with no value for the coupons sued on. He will turn over the proceeds of his judgment, if he gets one, to the assignors in their proper proportions. If those of them who are non-residents might have brought suit in the Circuit Court as *bona fide* holders, there is no reason in the world disclosed by the record why they should not have done so. We are entirely justified by their conduct in charging that they did not do so because they took the bonds with the knowledge of their worthlessness and have made the plaintiff their man of straw to conjure with. If such conduct can successfully pass the scrutiny and receive the approval of this Court, if such a plaintiff may not only wage such a suit, but invoke the rights which hedge around the innocent pur-

chaser of bonds valid on their face, then the statutes enacted for the protection of the Courts, and communities like the petitioner, are meaningless; the owners of all sorts of bonds may litigate their soundness, in the names of strangers or of aliens, without their knowledge; and municipalities may be plundered by their officials, in defiance and contempt of prohibitory statutes and constitutions. The precedent established by the Court of Appeals is already bearing fruit and bond issues held void in the past are reappearing from their musty coffins as assets in the hands of *bona fide* holders in other states, entitled to protection in the interest of justice and sound morality. What the end of it all will be largely depends upon the decision of this honorable Court in the pending cause, the transfers from former *bona fide* holders for value, and succeeded to all the rights of such holders. That Court does not go so far as to declare that the plaintiff paid anything for them but it would seem that this is not in its opinion an essential to his investments with the rights of a *bona fide* holder. Not a case can be found in the books to support the claim that this plaintiff can stand for a moment in this Court. The decisions and the statutes are arrayed against him and his case should be dismissed without reference to the merits of his contention concerning the validity of the bonds in controversy.

Barney vs. Baltimore, 6 Wall, 280.

Second.

The court erred in refusing to hold the bonds in controversy void, because they created a debt by loan in one year greater than that allowed by the constitution of Colorado.

"Section 6. No county shall contract any debt by loan in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges; and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county, following, to wit; Counties in which the assessed valuation of taxable property shall exceed five millions of dollars, one dollar and fifty cents on each one thousand dollars thereof. Counties in which such valuation shall be less than five millions of dollars, three dollars on each thousand dollars thereof. And the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this Constitution, shall not at any time exceed twice the amount above herein limited, unless when in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned; *provided*, that this section shall not apply to counties having a valuation of less than one million dollars."

This Court construed this section in the case of *Graham vs. Lake County*, and held that it means exactly what it says, and that the words are to be taken in their ordinary and usual significance. The language of the Court upon this point is as follows:

"We are unable to assent either to the conclusions of the Court below, or to the positions of defendant in error. The language of the sixth section seems to be neither complicated nor doubtful; no more and no less. It deals with the subject of county debts; and to begin

with, assumes a unit of measurement which is one and one half dollars in the thousand of assessed values; that is, one and one half mills on the dollar. That is about equal to the average amount of taxes levied for county purposes per annum under normal conditions. The provision then proceeds as follows:

First—It provides that no county shall borrow money in any way.

Second—Exception is then made in favor of the erection of necessary public buildings, and the making or repairing of public roads and bridges, and

Third—The loans allowed by the foregoing exception to be taken in any one year are limited to the amount of one and one half mills on assessed values in one class of counties, and three mills in another class.

Here the matter of indebtedness by loan is completed; and the section passes to a broader subject. Manifestly, the purpose of the collocation of the two passages in one section is not that by a wrested reading the latter may yet further limit and complicate the power of borrowing, but that the meaning of the latter passage may be more sharply and clearly defined and emphasized by an antithesis. It is an example, not of advertence, but of good rhetoric, as if special attention had been, by discussion and care, given to the wording of the section.

The next provisions are:

Fourthly—That the aggregate debt of any county for all purposes (exclusive of debts contracted before the adoption of the constitution) shall not at any time exceed the sum of three mills (or six, as the class might be) on assessed values; unless the taxpayers vote in favor of such excess, at some general election; and

Fifthly—That even when an election has been held, the aggregate debt so contracted shall not exceed, at any time, the sum of six mills (or twelve, as the case might be) on the assessed values. "

Lake County vs. Graham, 130 U. S., 674.

The undisputed testimony in this case showed that under the assessed valuation of Lake County for the year 1879, a rate of \$3.00 per thousand would

amount to \$10,456 and for the year 1880 that \$1.50 per thousand would be \$16,500. The express language of the first limitation upon county indebtedness is that no debt by loan shall be contracted in any one year to exceed \$1.50 on each thousand dollars assessed valuation, or if it is less than \$5,000,000, three dollars per thousand. Giving the plaintiff the benefit of the very broadest construction of this section, the limit of indebtedness of Lake County for 1879 and 1880 was always less than half of fifty thousand dollars. The total amount of bonds issued is set forth upon the face of each and every bond. A purchaser by looking at the assessment rolls of the county, and the face of the bond, could take the constitutional provisions and figure out the limit of indebtedness which the county could incur in any one year, and see that the issue was clearly in excess of that limit. The bond recites upon its face that it is one of a series of \$50,000 issued under authority of the election held on October 7, 1879. By looking at the assessment roll for that year the purchaser would see that no debt by loan could be contracted in excess of \$10,456. But the bond is dated July 31, 1880, and it may be that the assessed valuation of that year would govern. By looking at the assessed valuation for 1880, he would see that under the constitutional limit the indebtedness for that year would be \$16,500. He would also see that this was a debt by loan for \$50,000, and he would be put upon

notice that the bond issue exceeded the constitutional limit.

The bond itself had printed upon its back portions of the act of the legislature of Colorado of March 24, 1877, the portions consisting of sections 20, 21, 22, 23 and 24. These provisions were those under which the bonds were issued, and gave to the County the power to borrow money, and sets forth the method by which it could be done. The Court of Appeals, however, concedes that this was a debt by loan. But since this was controverted in the Court below, and may be controverted here we think it necessary to call attention to a portion of the Record.

Section 447 of the general laws of the state of Colorado, which was printed upon these bonds, is as follows: "The board of county commissioners *shall not borrow money* for the purposes hereinbefore stated without having first submitted to the question of *such loan* to a vote of the electors of the County and without a majority of the voters legally qualified to vote, and voting on that question, shall have voted therefor." (Transcript of record) page, 27.

The section herein referred to concerning the purposes for which money can be borrowed, confines it to necessary public buildings and making and repairing public roads and bridges. And the various proceedings adopted by the county commissioners in this case show that they did borrow money for the purpose of erecting necessary public

buildings, and constructing roads and bridges, and that they did submit to the voters of the county the question of making such loan. The acts of the board are set out in the transcript of the record, beginning with the offer made by counsel on page 75, to introduce the records for the purpose of proving this identical point. The statement of counsel was as follows:

"Now I want to offer certified copy of the various orders made by the county commissioners, and they are numbered from one to thirteen, with the exception of No Four, which I find relates to another matter, showing the action of the county commissioners in authorizing the bond issue, I introduce them for the purpose of showing that that was a debt created by loan. The first would perhaps cover the whole, if it is admitted that the bonds were issued in pursuance of them, and I do not think there is any question about that. After reciting the preamble, the board resolves, 'Whereas, the necessities of Lake County require,' etc. Now the records go on and show that an election was had, and the vote of the people was in favor of issuing the bonds, and that the bonds were sold, so that it shows altogether that this was the creation of a debt by loan; and we contend that under the first provision of the constitution of the state that the creation of a loan in any one year could not exceed \$1.50 per thousand, which would be about \$16,000 for this county; and it brings it within the rule laid down by the Supreme Court that where it appears on the face of the bond itself that it is beyond that amount, they are void: so that I offer these simply for the purpose of proving that this was the creation of a debt by loan." (Transcript of the record, p 75.)

Then follows exhibits sixteen to twenty-five.

Exhibit 16 is a copy of the order made by the board ordering the election. It contains *inter alia* the following: "Whereas, the necessities of Lake County require the erection of public buildings, and the building and construction of public roads and bridges, and there are no moneys in the treas-

ury of said county to meet the necessary outlay required for such purposes, and *a loan of a sufficient sum is required to meet such expenditures.* * * * It is therefore ordered by this board that the amount of money required for the erection of public buildings is the sum of fifty thousand (50,000) dollars, and for the building and construction of roads and bridges in the sum of five thousand (5,000) dollars, *and it is further ordered that the question of making such loan on the account of the county be and the same is hereby submitted to the vote of the electors of the said county.*" (Transcript of record, page 75.)

Exhibit 17 consisted of the proceedings of the board after the election had been held. It shows that the notice to electors contained the quotations above given, recites that the election was carried in favor of the loan, and then follows a resolution ordering the bonds, of which the first clause was as follows:

"First. That the bonds of Lake County to the amount of ten thousand, seven hundred and fifty (\$10,750) dollars be made and issued, *and a loan of money effected thereon*, to be used for the purpose of erecting necessary public buildings."

—Transcript of record, page 76.

Exhibit 18 recited a sale of the bonds for cash, and orders the money turned into the public building fund. The remaining exhibits dispose of the balance of the issue of the bonds in the same way.

But it was contended in the Trial Court, and this contention was supported by the opinion of the Court of Appeals that when a vote of the

people was had the limitation of a debt by loan in any one year did not apply. In other words, that the people, by voting to incur an indebtedness authorized the utmost limit provided by the constitution, and Judge Lochren, in his opinion, by a course of ingenious reasoning, arrives at this same result.

We cannot better answer Judge Lochren than by referring the Court to Judge Thayer's dissenting opinion. The answer is so complete and perfect, and at the same time so terse, that we reproduce it.

"I am unable to concur in the views expressed by my associates in the foregoing opinion. My disagreement arises out of the fact that I am not able to read section six, article eleven of the constitution of Colorado (quoted in the statement) as they have seen fit to construe it. Without going into the subject of length it will suffice to say that, in my judgment, the first paragraph of section six, article eleven of the constitution of Colorado, fixes an absolute limit to the amount of indebtedness created by loan, which a county may contract in any one year, either with or without the sanction of a popular vote, such limit being \$1.50 per thousand of the assessed valuation of taxable property in counties where such valuation exceeds five million dollars. This was the construction of the constitutional provision in question which seems to have been adopted in *Lake County vs. Rollins*, 130 U. S., 662, 690, and in *The People ex rel vs. May*, 9, Col., 80, 86, 87; but in the absence of these adjudications, I should entertain the same view, founded upon the language of the statute and the probable motive of the law maker. The framers of the Colorado Constitution intended, as I think, to impose such restrictions upon counties as would compel them to act prudently, no matter what might be the will of the people, and such restrictions as would prevent them, as far as possible, from exhausting their power to contract debts by overborrowing in a single year. To this end they prohibited counties absolutely from borrowing money, except for one purpose, and limited the amount that might be borrowed even for that purpose,

during a single year. Such being my interpretation of the constitutional provision in question, it follows therefrom that the trial court acted properly in directing a verdict for the defendant, because each bond showed on its face that the aggregate debt thereby created in a single year was \$50,000, and because the purchasers of the bonds were bound to take notice of the amount of the assessed valuation, which valuation did not authorize the creation of a debt by loan in a single year to an amount exceeding \$16,500. *Dixon County vs. Field*, 111. U. S. 83; *Hedges vs. Dixon County*, 150 U. S., 182; *Lake County vs Graham* 130 U. S., 674. The plaintiff below was not an innocent purchaser of the bonds in suit, but was affected with knowledge of a want of power in the county to issue the bonds, which rendered the same void. My associates apparently agree with me that the debt evidenced by the bonds in suit was a debt contracted by loan, so that nothing need be said on that point."

—Transcript of record page 151.

A moments reasoning is sufficient to show that Judge Thayer's conclusion must be the correct one. The Legislature of Colorado has the right to place any restriction upon counties in the way of incurring indebtedness that it may see fit. Under the act of March 24, 1877, it provided that no county should borrow money without submitting the question to a vote of the people. This was clearly within the legislative province.

It is stated by Judge Lochren that the legislature seemed to construe the constitution as giving permission to counties to borrow money within the utmost limit provided by that instrument and without reference to the one year proposition, but whether this is the legislative meaning or not it could not override or supersede the constitution. The legislature simply provided that the debt by loan should be voted upon by the people.

The constitution never intended that any such vote should abrogate the positive limitations contained in the first clause of Section 6. The Supreme Court of Colorado has construed a similar provision of the constitution in regard to state indebtedness in the same way, and has held that the provision limiting the indebtedness incurred by the state in any one year is mandatory.

In re-contracting of State Debt, 21 Col.,
399.

We cannot conceive how the Circuit Court of Appeals can say that the opinion of Mr. Justice Lamar in *Lake County vs. Rollins* is not intended to mean exactly what it says. Judge Lamar states expressly that the latter portion of the section does not enlarge, broaden or modify the first portion. The first portion of the section limits the power of the county in the borrowing of money; the latter portion limits the total indebtedness which may be incurred in every way. The constitution takes into consideration all form of indebtedness, which a county may contract. It limits the power of the county to borrow money, limits the purposes to which such money may be devoted, and finally the total indebtedness which the county may ultimately incur to a certain fixed percentage of its assessed valuation. It seems to us that the reasoning of his honor Judge Lochren is just as much a perversion of this section as was the contention made in the Court below in the case of *Rollins vs. Lake County*. In the *Rollins* case the Court below

and the counsel for the bond-holders sought by refined reasoning to show that the Section meant something different than its reading would indicate, and tried to read into it certain words which were not there. This Court decided that that could not be done. In the case at bar, the Circuit Court of Appeals has repeated the same thing and endeavored to make the section read as the bond-holders contend it should have read, that an indebtedness by loan may be contracted for three, six or twelve dollars per thousand, if voted on by the people, although the limit to \$1.50 per thousand in any one year is expressly imposed by the constitution itself in so many words.

The decisions of this Court tend to confirm the opinion of Judge Thayer and support our argument. *Dixon County vs. Field* is almost squarely in point. In Nebraska the constitution prohibited a county from donating to a railroad company an amount in excess of ten per cent of the assessed valuation of the property in the county, but also provided that by a vote of two-thirds of the people this could be increased to fifteen per cent. The people of Dixon county only voted upon the question of issuing bonds, but as a matter of fact more than two-thirds voted for the bonds. The amount of the issue was \$87,000. This was more than ten per cent but less than fifteen per cent of the assessed valuation. It was contended there as here that the vote of the people authorized the full limit of fifteen per cent, and the fact that this question was

not submitted was only an irregularity. But this Court said no, the constitution must be literally complied with. The reasoning of Mr. Justice Matthews is conclusive:

‘The construction claimed for the constitutional provision is, that whenever the Legislature has authorized an issue of bonds to the extent of 10 per cent upon the basis named the constitution operates, upon the authority, *ex proprio vigore*, and empowers the county officers to submit a proposition for an issue of bonds to the extent of 15 per cent upon the same valuation, and to issue the bonds accordingly, if sanctioned by a two-thirds vote of the electors of the county. It would result from the adoption of this interpretation, that an act of the Legislature authorizing an issue of bonds limited to the extent of 10 per cent upon the assessment, but requiring a previous two-thirds vote in favor of that proposition, would be unconstitutional and void, so far as it sought to limit the right to issue bonds in less than 15 per cent upon the assessed valuation of taxable property in the county; it being, upon this supposition, a constitutional right and power of the county, when the statute authorized an issue of bonds at all, to increase the authorized amount upon a two-thirds vote by the maximum addition fixed by the constitution.

“Such a construction of the constitution seems to be predicated upon the idea that one of the evils sought to be remedied by such provision is the reluctance of legislative bodies to grant to municipal corporations sufficiently extensive privileges in contracting debts for purposes of internal improvements; but the history of the constitutional amendment does not seem to us to justify this assumption.

“On the contrary, we regard the entire section as a prohibition upon the municipal bodies enumerated, in the matter of creating and increasing public debts, by express and positive limitations upon the legislative power itself. There must be authority of law, that is by statute, for every issue of bonds as a donation to any railroad or other work of internal improvement; and the election required as a preliminary may be determined by a majority vote, if the Legislature so prescribes, in which event the amount of the donation of the county, with that of all its subdivisions, in the aggregate shall not exceed 10 per cent of the assessed valuation of the taxable property in the

county ; but the Legislature may authorize an amount, not to exceed 15 per cent on the assessment, on condition, however, that at the election authorized for the purpose of determining that question, the proposition shall be assented to by a vote of two-thirds of the electors. It would be an anomalous provision, that whenever statutory authority was given to issue a prescribed amount of bonds, it should operate as an authority, upon a popular vote, not otherwise directed, to issue an amount in addition. We cannot think it was any part of the purpose of the constitution of Nebraska to enable a county either to add to its existing or its authorized indebtedness any increase, without the express sanction of the Legislature ; and are persuaded, on the contrary, that the true object of the provision is to limit the power of the Legislature itself, by definitely fixing terms and conditions on which alone it was at liberty to permit the increase, as well as the creation of municipal indebtedness. The language of the proviso that seems to countenance a contrary construction by words apparently conferring an immediate power upon counties to increase their indebtedness, must be taken in connection with the express and positive prohibition of the body of the section. This denies to municipal bodies all power to make any donations to railroads or, in other words, of internal improvement, except by virtue of legislative authority, and an election held to vote on the particular proposition in pursuance thereof. The proviso makes a special rule for a special case, and authorizes an additional amount of indebtedness, but only to be contracted in the contingency mentioned, and subject to the conditions already prescribed for all donations, that is, by means of an election to decide the question submitted, held in pursuance of statutory authority. An indebtedness to the extent of 10 per cent on the assessed value of the taxable property may be authorized by statute, to be decided by a mere majority of the popular vote ; but no more than that amount shall be permitted by the Legislature, except when approved by two-thirds of the electors ; and in no event more than 15 per cent upon the assessment, in the aggregate, including any pre existing indebtedness "

Dixon County vs. Field, 111 U. S., 88-90.

We can adduce no better arguments in favor of our position. The provisions of the constitution of the State of Colorado, make a special rule for a special case, to wit: that no county shall borrow

more than \$1.50 or \$3.00 per thousand upon its assessed valuation in any one year. The legislature can authorize no increase of this amount whether by a vote of the people, or in any way, shape or form.

It is remarkable that in order to reach its conclusions the Court below was compelled to hold the solemn words of a constitution to be directory merely and not mandatory, a thing unheard of in American jurisprudence. Judge Lochren's opinion is that so long as the county could incur a total indebtedness of a certain amount, the fact that it disregarded a constitutional provision for any one year would be immaterial. In other words he construes the first clause of Section 6 as being directory and not mandatory. This is a new canon of constitutional law. All of the authorities and all of the Courts have, without a single dissenting voice, declared that positive language in a constitution was a mandate which no officer or government can disregard. This has become one of the maxims of constitutional law.

Cooley's on Constitutional Limitations,

74.

Sutherland on Statutory Construction,
Sec. 79.

The Court also contends that this defense is not set up in the answer of the defendant. No such contention was ever made by counsel, either in the Trial Court or the Court of Appeals. An examination of the answer, however, will show be-

yond controversy that the defendant proposes to contest the validity of the bond issue upon the ground that it was not warranted by the terms of the constitution under which the county authorities were acting. But whether set up in the answer as a special defense, the complaint alleges that the bonds were issued in compliance with the Constitution and Statutes of Colorado, and this allegation is squarely denied. This of itself warrants the Court in holding the bonds void, whenever it appears from the evidence that they were issued in excess of the constitutional limit. The facts upon which this defense is based are admitted. The assessed valuation of Lake County for the years 1879 and 1880 is expressly admitted by counsel for the plaintiff. (Transcript of record, page 47). The amount of the bond issue appears upon the face of each bond as set forth in the complaint, the rate of indebtedness is fixed by the Constitution, so that we have all of these factors in the case without dispute and without objection. It only remained for the Court to declare under the pleadings and undisputed testimony in the case that the bonds sued upon were invalid by reason of their being issued in violation of the provisions of the Constitution of Colorado. The factors necessary to bring about this result are the constitutional provision, the amount of indebtedness, and the recital upon the face of the bonds.

Dixon County vs. Field, 111 U. S., 83.

Hedges vs. Dixon County, 150 U. S., 182.

Third.

The Court below erred in holding that the semi-annual statements of indebtedness of Lake County, the bond and warrant registers, and other public records of the county, were not relevant testimony under the issues, and sufficient to put all purchasers of county indebtedness upon notice as to the actual amount of outstanding indebtedness at the time the bonds were issued.

This case was defended in the Court below, so far as this feature of it is concerned, upon two theories: *first*, that the bonds were issued at a time when the right to incur indebtedness was governed by the assessment of 1879, and *second*, when the right to incur indebtedness was limited by the assessment of 1880. It was decided by the Supreme Court in the case of *Standley vs. Lake County*, 24 Colo., 1, that the assessed valuation of property in Colorado became effective on the first day of September of each year. From the Statutes of Colorado, construed in that case, and numerous decisions in other states, it was held that the assessed valuation did not become effective until finally equalized by the State Board of Equalization. This by statute in Colorado was fixed for the first day of September, and it was held that the assessment for each preceding year was in force and effect until the first day of September of the succeeding year. So that the assessed valuation for 1878 would continue until the first day of

September, 1879; then the assessed valuation for 1879 would commence and continue until the first of September, 1880. Inasmuch as Lake County was created by act of the General Assembly of 1879, the assessed valuation of that year is the first ever made for the County.

The testimony in the case shows that the assessed valuation for the year 1879 was \$3,485,628, that is for the year beginning September 1, 1879, and continuing until September 1, 1880. From September 1, 1880, to September 1, 1881, the assessed valuation was \$11,126,489. The utmost limit of indebtedness under the Constitution that could be incurred for the year 1879 was \$41,827.53. This is \$12 per thousand, and is the highest limit allowed by the Constitution under any possible combination of circumstances. The utmost limit of indebtedness for the year 1880 was \$66,758.83. Counsel for the County contended in the first place that the bonds in this case were limited by the valuation for the year 1879. If this valuation be taken, then the utmost limit of indebtedness being \$41,827.53, and the bonds reciting upon their face that they represent a total issue of \$50,000, the case comes clearly within the doctrine laid down in *Field vs. Dixon County* and *Hedges vs. Dixon County*. The only factors necessary for the Court to look at would be the limit fixed by the Constitution, the assessed valuation, and the bond itself. No other testimony need be introduced or need be considered. The complaint alleges that

the bonds were issued on the 31st day of July, 1880. The evidence shows that \$11,000 were issued on March 17, 1880, and that on the 3d day of August, 1880, a bid for the remainder of the bonds was accepted, and on September 6, 1880, all things in connection with the bonds were ratified. It is true that on September 6th the old bonds were called in and new ones issued in their stead, but no new debt was created. The money was not borrowed at that time, but prior thereto, so that we think beyond controversy the debt was created as early as the 3d of August, 1880, and that the bonds should run from the date which they bear, July 31st, 1880.

The Court of Appeals to avoid this result say that the bonds were not issued until after September 6, 1880, and say that the bonds were antedated but the entire record as shown by the proceedings of the county commissioners beginning on page 75 of the record, and ending on page 95, show that the debt was actually created long before this time. That is the date which should prevail.

Doon Township vs. Cummins, 147 U. S.,
366.

But the defendant to be on the safe side also took the other phase of the case, viz., that the bonds were issued under the assessed valuation of 1880. Then the total assessable property in the county had increased to over eleven millions and the right of the county to contract a debt had gone

to \$66,000. This would take the case from without the terms of *Field vs. Dixon County*, and introduce a new element into its consideration.

In *Field vs. Dixon County*, the only factors to be considered are the assessed valuation, the amount of the bond issue as recited upon the face of each bond, and the rate fixed by the constitution. But if the bond issue itself recites a total which is within the power of the county to contract according to its assessed valuation, then it becomes a material factor as to what the previous indebtedness of the county was. In other words, it is necessary to show that the county was already indebted in a sum which, of itself or added to the new bond issue, would exceed the constitutional limit. The county in this case, therefore, undertook to show the actual amount of its indebtedness at the time these bonds were issued. It was contended at the Trial Court—and this contention seems to be sustained by the Court of Appeals—that the only way to prove this indebtedness was by the semi-annual statements, which, under the statutes of Colorado, the county commissioners are required to make and publish twice a year. The semi-annual statements were introduced for this period, but for some reason which it is difficult to understand, the Circuit Court of Appeals say that no semi-annual statements were kept. The county contended that it had a right to show the actual amount of its indebtedness at the time the bonds were issued by any of the public records required by law to be

kept by the county authorities. An examination of the record shows the following facts upon this question: first, that the act of March 24th, 1877, entitled, "An act concerning counties, county officers and county governments and repealing laws upon this subject" is the act of the legislature under which the bonds in question were issued, and that the entire act consists of 143 sections; second, that by other provisions in said act, which will be called to the attention of the Court, the county is required to keep a warrant register showing all county warrants or certificates of indebtedness issued by the county, a bond register, showing the number and value of bonds, and a book of semi-annual statements in which were to be recorded twice a year a statement of the financial transactions of the county for the preceding six months with a showing of just how the county stood at that time as to liabilities and assets; and *third*, that the defendant offered in evidence the warrant register of Lake County by which it appeared that at all times from the 4th of October, 1879, to the issue of the bonds in controversy, Lake County was indebted beyond the amount permitted by the constitution of Colorado, and the semi-annual statements for the periods ending December 31, 1879, and June 30, 1880, were introduced showing an outstanding indebtedness of \$84,206.28 on January 1, 1880, and on July 31, 1880 of \$198,394.57. All of these facts were held by the Court of Appeals to be immaterial and irrelevant. Upon what theory this result was arrived at we

are at a loss to understand. The Court concedes that if there is a statutory public record which sets forth the amount of outstanding debts a county will not be estopped by any recitals in a bond issue from showing that the previous debt of itself or when added to that amount by the new bonds exceeds the constitutional limit. Having admitted this much the Court ignores the laws of Colorado and the facts disclosed in this record. It ignores the statutes relating to bond and warrant registers and says that the evidence in the case shows that no book of semi-annual statements was kept by the County Commissioners of Lake County. There seems to pervade the minds of counsel for the other side and of the Court below an impression that the only public record to which an intending bond purchaser is required to look is the record of semi-annual statements. This idea has arisen from the fact that this record was commented upon by this Court in the case of *Sutliff vs. Lake County*, but an examination of the statutes shows that other records of equal dignity are required to be kept and to be open for public inspection, and were just as much notice to persons taking the securities of the county as the record of semi-annual statements.

We will look at these various records in detail.

First.—The register of county warrants.

The statutes of Colorado require both the county clerk and recorder and the treasurer of the

county to keep a record of all the warrants or orders issued by the county, which record shall contain the date, amount and number of the warrant, and when paid. The provisions relating to this duty are contained in the following section of the General Laws of 1877.

"SEC. 463. County orders shall be signed by the chairman and attested by the clerk, and shall specify the nature of the claim or service for which they are issued.

"SEC. 467. The board of county commissioners at the January and July session of each year, or oftener if they deem it necessary, shall carefully examine the county orders returned by the county treasurer, by comparing each order with the record of orders in the clerk's office. They shall cause to be entered on said record, opposite to the entry of each order issued, the date when the same was cancelled.

"SEC. 471. Such clerk shall not sign or issue any county order unless ordered by the board of commissioners authorizing the same; and every such order shall be numbered, and the date, amount and number of the same, and the name of the person to whom it is issued, shall be entered in a book kept by him in his office for that purpose."

And the duties of the county treasurer as to the warrant register, are contained in the following section :

"SEC. 529. Every county treasurer shall have and keep in his office to be called the registry of county orders, wherein shall be entered and set down at the date of the presentation thereof, and without any interval or blank line between any such entry and the one preceding it, every county order or other certificate or evidence of county indebtedness, at any time presented to the county treasurer for payment, whether the same is paid at the time of the presentation or not, the date and number of such order, the amount for which the same is payable, the date of the presentation thereof, and the name of the person presenting the same. Every such registry of county orders shall at all reasonable hours be open to the inspection and examination of any person desiring to examine the same."

The effect of these provisions is to provide two books to be kept by the public officers of a county, containing a complete record of its running indebtedness. They show the amount of indebtedness incurred day by day, and might be called day books and journals of the county. These books show all evidence of indebtedness issued by the county, when issued, and when paid. At the close of business for each day the amount of outstanding indebtedness of the county can be ascertained from the books and Section 470 requires the county clerk to give a certified copy of the record in his office to any one who shall demand it, and Section 539 prescribing the duties of the county treasurer requires his register to be kept open at all reasonable hours for the inspection of the public, and the general provisions of the statutes require all the books of the county clerk's office so to be open.

Second: The bond register to be kept by the proper officers.

In case any bonds are issued by a county, which are of a somewhat greater sanctity, perhaps, than county warrants, they are also required to be registered and kept in a book for that purpose.

" Section 451. The bonds issued, as heretofore provided shall be signed by the chairman of the board of county commissioners, and attested by the clerk of the county, and bear the seal of the county upon each bond, and shall be numbered, and registered in a book kept for that purpose, in the order in which they are issued.

" Section 454. No county commissioners shall be authorized to issue such bonds, unless the question shall have been submitted to a vote of such electors of the county, and in such manner and form as

provided in section twenty one of this act, and a majority shall have voted therefor, and the bonds issued shall be signed by the chairman of the board of county commissioners and attested by the clerk of said county and bear the seal of the county upon each bond, and shall be numbered and registered in a book kept for that purpose, in the order in which they are issued. Each bond shall state upon its face the amount for which the same is issued, to whom issued, and the date of its issuance."

Both references are made to the General Laws of 1877.

This provides a record for any indebtedness in addition to the warrant register. By looking at these two books the public can at all times tell exactly what the outstanding obligations of the county are.

Third—the semi-annual statements of the county's financial condition.

Section 457 is as follows:

"It shall be the duty of the board of county commissioners of each county to make out semi-annual statements at the regular sessions in January and July, at which times they shall have such statement published in some weekly newspaper published in the county, if there be such published; and if there be no newspaper published in the county, such commissioners shall cause such statement to be posted in three conspicuous places in said county, one of which shall be the court house door; and such statement shall show the amount of debt owing by their county, in what the debt consists, what payments, if any, have been made upon the same, the rate of interest that such debts are drawing, also a detailed account of the receipts and expenditures of the county for the preceding months, in which shall be shown from what office and on what account any money has been received, and the amounts, and to what individuals and on what account any money has been paid, and the amounts; and shall strike the balance, showing the amount deficit, if any, and the statement thus made, in addition to being published, as before specified, shall

also be entered of record by the clerk of the board of county commissioners in a book to be by him kept for that purpose only, which book shall be open to the inspection of the public at all times."

The only effect of this section is to require the County Commissioners twice a year to strike a balance with the county's finances, and to make such balance sheet a record in a book kept for that purpose. It is a book of balances struck from the records of the county at these particular seasons, and no more a public record of the county indebtedness, than the other documents required to be kept by the county. It is simply a requirement made for the purpose of having the county, twice a year, know definitely just how it stands and having this statement given to the people so that they may know how their officers are discharging their duties. But in the very nature of things, it cannot be given that peculiar sanctity for which counsel for plaintiff in error contends. Let us say, for instances, that the semi annual statement for January 1, 1880, showed the outstanding indebtedness of Lake County to be \$37,000. Suppose this should be the limit of indebtedness which the county could incur. Taxes are due in Colorado beginning the first of January. Within the period of the next ninety days, or four months every dollar of this indebtedness might be paid off. This fact would appear upon the county warrant register, and county bond register, records open to the inspection of every one, but could not go into a semi-annual statement before June 30th. The county

would then be permitted to contract an additional indebtedness of \$37,000. Could it be contended that bonds or warrants issued for this amount would be invalid, because the semi-annual statement of January 1st, showed the county to be indebted to the full amount of the constitutional limit? Such a contention is necessarily absurd. The warrant register, and bond register, are the real records to which attention must be directed from time to time for the ascertaining of the amount of outstanding indebtedness.

Fourth. The county commissioners are required to enter an order specifying the amount of indebtedness to be incurred before any bonds are issued.

Here is another county record expressly required by statute to be made and recorded before any bonds can be issued. This is Section 448, which is in part as follows:

"When the county commissioners of any county shall deem it necessary to create an indebtedness for the purpose of erecting necessary public buildings, making or repairing public roads or bridges, they may, by an order entered of record specifying the amount required, and the object for which such debt is to be created, submit the question to a vote of the people at a general election."

All of these provisions of the statute of Colorado are contained in the act referred to in the bonds issued in this case, and a portion of which is printed on the back of each bond.

The transcript in this case shows that all these public records, to which we have just called attention, were kept by the county, and that they contained the facts necessary to show that the

county had exceeded the limit of indebtedness named in the constitution prior to the issuance of these bonds. The warrant register of Lake county was introduced as Exhibit No. 10. It was a very bulky document, and in place of being inserted in the record in full, a stipulation was made concerning it as follows:

"It is hereby stipulated and agreed by, and between the plaintiff in error and the defendant in error in the above entitled cause, that Exhibit No. 10 which was introduced in evidence in the trial of said cause by the defendant in error, consists of a certified copy of the warrant register of Lake County, Colorado, for the period beginning June 30, 1879, and ending December 31, 1880, and in substance shows the following facts: That the total outstanding warrants issued by Lake County, consisting of promises to pay that amount of money, and purporting to represent the indebtedness of Lake County, consisted of the following sums upon the following dates: June 30, 1879, \$33,432 98; October 7, 1879, \$58,382.46; December 31, 1879, \$86,146.81; June 30, 1880, \$209,897 55; December 31, 1880, \$362,683 23.

"And it is further stipulated and agreed that said Exhibit shows that the indebtedness between each of the dates above mentioned continually increased until it reached the amount named in the next period of indebtedness; that is to say, the total indebtedness each, and every day, increased from the sum of \$33,432 98 upon the 30th day of June, 1879, until it reached the sum of \$362,683 22 on the 31st day of December, 1880, and the above sums mentioned in the particular dates, simply show the amount of outstanding warrants existing at that particular time."

—Transcript of record, page 74.

This public record, which was accessible to all purchasers of bonds, showed, beyond controversy, that the limit of indebtedness had been reached and passed at all stages of the proceedings, no difference what year we may take, or what period of the year.

"But," says Judge Lochran, "in this case it is clearly shown that there never were any such semi-annual statements or record thereof covering any of the time which could effect the legality of these bonds."

This ignores the other records entirely and intimates that the semi-annual statements are the only records that can be looked to.

The facts in regard to the semi-annual statements themselves, as disclosed by the record, show that the Court below simply refused to consider the actual evidence in the case. J. W. Newell, the County Clerk and Recorder of Lake County, was called as a witness. He stated that he was familiar with the records of Lake County. He was shown a book which was marked upon the back "County Clerk's Account Book." This book was one in which was recorded the semi-annual statements of Lake County from the 1st of January, 1880, to the 1st of January, 1889. He testified that it was the only book kept by the county which showed those facts; that while the entries in the book were not made as the record of semi-annual statements was afterwards made, it showed all of the material facts required by the statute, and was the only book kept by the county for that purpose at that time. (See the testimony of Mr. Newell, pages 63-70 of the record.) Three of the semi-annual statements were then introduced in evidence from the book and certified to by the County Clerk and Recorder. The substance of these statements corresponds with the requirements of the statute, and they show that on the 1st day of January, 1880,

there were outstanding warrants of Lake County to the amount of \$84,296.28 on the 1st day of July, 1880, \$193,394.57; on the 1st of January, 1881, \$293,063.20. In addition to this it was shown that these semi-annual statements were ordered by the Board of County Commissioners, to be made up as required by statute, and were published in the newspapers at the time (Transcript of the Record, pages 111 to 121.) We submit that under this evidence a purchaser of bonds would be required to take notice of these semi-annual statements. The statute does not require that any particular name be given to the book, but simply that they be kept in a book for that purpose only. The testimony shows that this was done, and that the book was denominated the "County Clerk's Account Book." Any person asking to see the record of semi-annual statements would be shown this book. Whether or not the statements were published at the time they were made out, as required by statute, would be an immaterial matter. A purchaser would not be bound to look at the publication, but at the record itself. The material matter, so far as the creditors of the county are concerned, would be the actual record, as shown by the books of the County Clerk and Recorder. It would be strange indeed if, where the constitution of the State placed an absolute limit upon the indebtedness which a county could contract, the county could, by failing to keep a proper record, exceed that limit. As this Court has said so often, this limitation controlled all of

the departments of the government and the people of the county themselves. They were powerless to go beyond it. It was not a question of the defective execution of a power, but of exercising a power where none existed. Can it be said that a mere municipal board of inferior county officers can, by failing to keep a proper record, override a positive constitutional limitation? Under the theory of the Court of Appeals, if the record of semi-annual statements had been kept, that was but slightly defective, it would be treated as no record at all, and purchasers of bonds would not be required to take notice of it. We fail to see what distinction there can possibly be between a slightly defective record and a record that is grossly defective. So far as we are concerned, we believe the record in this case to be only slightly defective—in fact, we do not believe that it is defective at all. It sets out every material requirement provided for in the statute. So far as notice to creditors is concerned, it is exact in giving the amount of outstanding indebtedness of the county. That is the only item concerning which a purchaser of bonds is required to take notice. If it contained other things and was given another name, it matters little whether the balance was good, bad or indifferent, or whether any other balance was in existence or not.

But the Court of Appeals says that a record kept in this way is no record at all. Upon what theory this result is reached is inconceivable to us.

But we are not without authorities in support of our contention that it was the duty of a proposed creditor of the county carefully to search out and ascertain what the records of the county showed as to indebtedness. In *Buchanan vs. Lichfield*, 102 U. S., 292, it was shown that there was no assessed valuation of the town at the time the debt was incurred. Under the theory of the Court of Appeals in this case, that would have been fatal to any record whatever concerning those facts; but this Court held that under those circumstances it is the duty of the purchaser of bonds to look at the assessed valuation of all the land within the county, take a map of the corporate limits of the town and segregate from the land within the county all of the land located within the town, add up these assessed values, and thus ascertain what was the actual assessed valuation of land within the town limits. This decision is based upon common sense and common reason and shows the absurdity of the conclusion reached by the Court of Appeals. And in the same case it is shown that the official records of all kinds are to be looked to for the purpose of ascertaining the total outstanding debt. That case is authority for the proposition that not only would this imperfect semi-annual statement be notice to an intending purchaser of bonds, but that the warrant register, bond register and all other records of the county would be notice.

And again, this Court in the case of *Doon Township vs. Cummings*, 142 U. S., 366 say: "It would be inconsistent alike with the words and with the object of a constitutional provision framed to protect municipal corporations from being loaded with debt beyond a certain limit to make their liability to be charged with debts contracted beyond that limit depend solely upon the discretion or honesty of their officers." These rules have been enforced in other jurisdictions and sanctioned by Judge Dillon in his work upon municipal corporations.

Thus it is held in Pennsylvania under a similar statute that where such a statement is required to be kept by public officers that the purchaser of bonds will be deemed to have had sufficient knowledge of what ought to have appeared in such statement,

Millerstown vs. Frederick, 114 Pa. St.,
435.

Dillon on Municipal Corporations, Sec.
529.

It follows from what we have said that the Court below was clearly wrong in holding that the Circuit Court erred in admitting these financial statements, the warrant register and other records of indebtedness in evidence.

The Court sustained this ruling wholly upon the case of *Chaffee County vs. Potter*, 142 U. S., 355. That case has only been cited by this Court twice since it was decided—once in the dissenting opinion

in Doon Township vs. Cummings, decided upon the same day, and again in the case of Sutliff vs. Lake County, 147 U. S., 230, where the opinion was written by Mr. Justice Gray, who dissented from the Potter case.

It might be well to refer to the fact that in the Potter case the attention of the Court was not even called to the statutes of Colorado relating to county indebtedness. But however that may be the Potter case could have nothing to do with the one at bar, for the reason that there is no recital in the bond here sued on that the limit of indebtedness prescribed by the constitution had not been reached. The recital here is exactly the same as that contained in the bonds sued on in the case of *Sutliff vs. Lake County*. There it was held explicitly that if the statute expressly requires those facts to be made a matter of public record, open to the inspection of everyone, there can be no indication that it² was intended to leave that matter to be determined and concluded contrary to the facts so recorded by the officers charged with the duty of issuing the bonds. The *Sutliff* case decides explicitly that where the statutes require the amount of county indebtedness to be a matter of public record, no recitals in the bonds can estop the county from proving the actual indebtedness existing at the time the bonds were issued. That is all that the defendant did in this case. The *Sutliff* case does not decide or purport to decide that the only record of county indebtedness is the semi-annual statements. It

makes the broad, sweeping proposition that wherever the county indebtedness is by law required to be spread upon the records of the county, open to the inspection of everyone, it is a fact of which all the world is bound to take notice, and as to which the county cannot be concluded by any recital in the bond. The statutes of Colorado make the registry of county warrants and the bond register public records, open to the inspection of everyone, and make them the primary source from which the county debt is to be ascertained. They are the real county records, showing the actual existing indebtedness of the county. The semi-annual statements are mere trial balances, struck for the convenience and for the information of the county at the end of every six months. They are simply balances and required to be published and recorded in a book kept for that purpose only, so that people may know at least twice a year as to how much money they owe and in what shape the debt exists. But for the actual indebtedness of the county the true record is the warrant register and bond register themselves. There was no pretense that a warrant register was not kept as required by law, or that the bond register was not kept as required by law. The warrant register showed that upon the day this vote was taken, October 1, 1879, the county was indebted in the sum of \$58,382.46, which was \$17,000 more than the total limit of indebtedness possible at that time; that on the 30th of June, 1880, the indebted-

ness was \$209,897.55, or over three times the utmost limit of indebtedness for the year 1880; that between these dates the indebtedness increased from the smaller amount to the larger; that there never was a single moment of time when the county was not indebted away and beyond the utmost limit prescribed by the constitution of the State of Colorado. (Exhibit 10, Transcript of record, page 84). This public record, concerning which there is no dispute as to its being kept in accordance with the statute, which was introduced in evidence in the Court below, which was open to the inspection of everyone, could not under the decisions of this Court be swept away by any recital contained in the bonds sued upon in this case. The Circuit Court for the District of Colorado was clearly right in admitting it in evidence, and the Circuit Court of Appeals was clearly wrong in deciding that it was inadmissible.

Fourth.

The Court erred in holding that the bonds in controversy were valid obligations of Lake county.

Most of the questions connected with a discussion of this proposition have been called to the attention of the Court, but we desire to refer to a few of its decisions, the principles established by them, and compare the result with the rules laid down by the Circuit Court of Appeals for the Eighth Circuit.

This Court early held that where a municipality had the power to incur a certain indebtedness dependent upon the condition of certain facts which facts were to be ascertained by the officers of the municipality, and those officers met and determined the existence of those facts, the county was afterwards estopped to deny them. For instance, if a county was permitted to incur a debt, provided a majority of the people of the county voted for it, and an election was held, and it was certified by the proper county officers that a majority had voted in favor of incurring the debt, that this would amount to an adjudication upon that point binding upon the county, and if bonds were issued containing a recital to this effect the county would be estopped to deny the truth of the assertion. But the Court has also held that where there was an utter want of power in a municipality to incur an indebtedness at all, no recital and no finding of any kind by the county officers would estop the county from showing this want of power. In other words, the Court has simply asserted what is a self-evident proposition, that where a person lacks power to do a particular act, the assertion that he has the power will not confer it.

Buchanan vs. Lichfield, 102, U. S., 278.

Lichfield vs. Ballou, 114, U. S., 190.

Dixon Co., vs. Field, 111, U. S., 83.

Lake County vs. Graham, 130, U. S., 674.

Doon Township, . vs. Cummings, 142,
U. S., 366.

Nesbitt vs. Independent District, 144,
U. S., 610.

Sutliff vs. Commissioners, 147, U. S.,
230.

Hedges vs. Dixon County, 150, U. S.,
182.

Graves vs. Saline County, 161, U. S.,
359.

The profession and text writers have always regarded these decisions as establishing beyond controversy, that what was meant by a want of power in a municipality was an absolute prohibition contained in the constitution of the State, denying such power. In other words, as repeatedly stated by this Court, whenever the constitution of the State prohibited a municipality from incurring a debt beyond a certain amount, this was an absolute denial of the power to create the debt and the county could not by an act of its own of any kind, nature or description, assume the power and create the debt. There is an exception to this which exists whenever the constitution itself gives the power and puts it within the duties of an inferior tribunal, to determine whether or not certain facts have been complied with. For instance the Colorado constitution absolutely prohibits the incurring of a debt beyond a certain amount unless a majority of the voters of the county have voted upon the proposition, and agree to incur the debt. We do

not believe there would be any question but what the recital in the bond by the proper county officers, that an election had been held and the debt had been authorized, would be binding upon the county; but no legislative provision authorizing a county to incur a debt, beyond a limit laid down in the constitution, or any act upon the part of the county officers, or the entire State, and county government could give validity to a county debt, incurred in violation of this constitutional provision.

We do not think it necessary to call attention to the language of any of these decisions, although we can scarce refrain from quoting the emphatic language of Mr. Justice Miller in *Litchfield vs. Ballou*, the unsurpassed reasoning of Mr. Justice Matthews in *Buchanan vs. Litchfield*, or the logic of Mr. Justice Gray in *Sutliff vs. Lake County*, but we will not take up the time of the Court by any such quotations. The Circuit Court of Appeals seems determined to do away with the salutary rules established by this Court in these decisions and to enforce all municipal bonds, regardless of constitutional or other inhibitions.

In *National Life Insurance Company vs. Board of Education*, 62 Federal Reporter, 778, the Court of Appeals expressly holds that a recital to the effect that a constitutional limit has been complied with will estop the county from showing that the power to issue the bonds was taken away by the constitution. The Court disposes of the rule announced by this Court in *Hedges vs. Dixon*

County, that no constitutional limitation could be evaded by a recital in the bond by saying that "the remark should undoubtedly be limited to the particular facts in those cases." And the Court in that case places a constitutional limitation within the control of the legislature, by saying that recitals will not estop a county where no act of the county could make the issue lawful, and this fact appears from the constitution and statute under which bonds are issued. The public records referred to therein and the bonds the purchaser buys, and by stating the converse of the proposition, *that a recital will operate as an estoppel, even where the body that issues the bonds has no power to issue them, and could not by any acts of its own, make a lawful issue of bonds*, if that fact does not appear from the bonds the purchaser buys, the constitution and the statutes under which they are issued and the public records referred to therein. In other words, notwithstanding a lack of power exists, it may be supplied by a recital to that effect. The Court relies for this result upon:

Buchanan vs. Litchfield, 102 U. S., 378.

Pana vs. Bowler, 107 U. S., 529.

Oregon vs. Jennings, 119 U. S., 74.

Chaffee County vs. Potter, 142 U. S., 355.

An examination of all of these cases will show that not one of them sustains the doctrine contended for by the Court of Appeals but on the contrary all sustain the rule announced by this Court in the other cases that an absolute want of

power could not be supplied by a recital of its existence.

Mr. Justice Harlan delivered the opinion of the Court in *Buchanan vs. Litchfield*, and while his honor has always insisted that municipalities should pay any debt which they had contracted and has dissented from all of the later cases, the doctrines which he laid down in this case are entirely satisfactory so far as the actual decision is concerned. The case establishes the proposition that where the constitution expressly prohibits a municipal debt the debt cannot be incurred. In regard to a recital as to the amount of a debt he simply says that such a recital might estop the county as against a *bona fide* purchaser. This question was not necessary to a decision of the case, was not decided but was simply referred to as a possible result in case it had existed.

In *Pana vs. Bowler*, the question turned upon bonds that were issued prior to the adoption of a constitutional limitation in Illinois, and upon the point relied upon by the Court of Appeals the Court expressly placed its decision upon the fact that an election had been held prior to the adoption of the constitution.

In *Oregon vs. Jennings*, the bonds were also issued after a vote of the people taken before the constitution of Illinois had created a limit of indebtedness, and no constitutional question upon this point was decided in the case. The only case

in the books where a recital has been held valid against a want of power is *Chaffee County vs. Potter*. That decision stands alone in the records of this Court, and we believe was decided under a misapprehension of facts by this tribunal, but whether it was or not, it does not, of itself, support the sweeping conclusions reached by the Court of Appeals, nor affect the issue in this case.

The other cases to which we have called the attention of this Court establish the rule so firmly that the Court of Appeals has found it necessary to overrule them. In the case at bar the opinion of Mr. Justice Lamar in *Lake County vs. Rollins*, 130 U. S., 662, is frittered away. The plain meaning of Mr. Justice Lamar's language is stated by Judge Lochren to be a misconception of a sentence. Such an assertion was absolutely necessary to justify the result announced, and this result was reached by the conclusion that what this Court there said was not necessary to a decision of the case, and when taken in connection with the rest of the opinion, did not mean what the language stated. But the Court of Appeals has not stopped with these two cases. In the case of the *City of Huron vs. the Second Ward Savings Bank*, 86 Fed. Rep., 272, it has carefully brushed away the decision of this Court in *Doon Township vs. Cummings*. In regard to that case the Court says: "The distinction seems to be no more nice than real, and in view of the vigorous dissent which is recorded with the opinion, we may be permitted to doubt whether it

will ever be made again." Thus the Court will see that gradually but steadily the Circuit Court of Appeals for the Eighth Circuit is attempting to get rid of all of these decisions which say a constitutional provision must be enforced. The Court began by holding Mr. Justice Matthews' remark in *Dixon County vs. Field* to be an *obiter dictum*. It continued its course by in this case saying that Mr. Justice Lamar's language did not mean what it said, and it has finally squarely overruled *Doon Township vs. Cummings*, and said that the decision would never be followed again.

But this Court has announced the rule in too many cases, and in cases later even than those of the Court of Appeals, to leave much doubt as to whether it will permit its decisions to be overruled in this way. *Graves vs. Saline County*, 161 U. S., is the latest expression of opinion that we have been able to find, and that reaffirms the rule repeatedly stated by this Court that where a total want of power exists, no mere recital can supply it. The rule of this Court when applied to the facts here, establishes beyond controversy the invalidity of the bonds sued upon. The facts briefly are that Lake County, on the 31st of July, 1880, issued its bonds for \$50,000; the assessed valuation of the county at that time was \$3,485,628; the outstanding indebtedness at that time was \$209,897.55; the total legal debt which could be incurred by the county at three dollars per thousand, which was the rate fixed without a vote of the people, was \$10,456.88.

So that at that time there was in actual existence an illegal debt of \$199,440.67.

In case the people had voted upon the bond issue, as was done in this case, the total limit of indebtedness was \$41,827.53, leaving an illegal debt of \$168,070.02. The debt by loan was limited, of course, to \$1.50 per thousand. For the purpose of illustrating to the Court the exact situation of affairs, we append the following table. The figures from this table are taken from Exhibit No. 10, the semi-annual statements and the assessed valuation of the county, all of which are in evidence in this case.

First, without a vote of the people and confined to the lowest rate per thousand.

<i>Date.</i>	<i>Valuation.</i>	<i>Rate</i>	<i>Actual Debt</i>	<i>Legal Debt.</i>	<i>Illegal Debt.</i>
June 30th, 1879..	\$ 3,485,628..	\$3.00 per M..	\$ 33,432.98....	\$10,456.88....	\$ 22,976.10
Oct. 7th, 1879..	3,485,628..	3.00 per M..	58,382.46....	10,456.88....	47,925.58
Dec. 31st, 1879..	3,485,628..	3.00 per M..	86,146.81....	10,456.88....	75,689.93
June 30th, 1880..	3,485,628..	3.00 per M..	200,897.55....	10,456.88....	199,440.67
Dec. 31st, 1880..	11,126,489..	1.50 per M..	362,683.23....	16,689.73....	343,993.50

Second, with a vote of the people and expanded to the most liberal construction of the rate as limited by section six (6) of article eleven (11) we have the actual debt, the legal debt and the illegal debts, as follows:

<i>Date.</i>	<i>Valuation.</i>	<i>Rate.</i>	<i>Actual Debt.</i>	<i>Legal Debt.</i>	<i>Illegal Debt.</i>
June 30th, 1879..	\$ 3,485,628..	\$12.00 per M..	\$ 33,432.98....	\$41,827.53....	N.W. Vote
Oct. 7th, 1879..	3,485,628..	12.00 per M..	58,382.46....	41,827.53....	\$ 16,554.93
Dec. 31st, 1879..	3,485,628..	12.00 per M..	86,146.81....	41,827.53....	44,319.28
June 30th, 1880..	3,485,628..	12.00 per M.	200,897.55....	41,827.53....	168,070.02
Dec. 31st, 1880..	11,126,489..	6.00 per M..	362,683.23....	66,758.83....	295,924.40

Under the rules laid down by the decisions of this Court, we contend that the following propositions are indisputable:

1st. That this case comes within the rule of *Field vs. Dixon County*; that the bonds show upon their face, taken with the assessed valuation, that they are beyond the limit of indebtedness permitted by the county, in that they must be based upon the assessed valuation for the year 1879, as they were issued before the 1st of September, 1880. The limit of indebtedness prior to that time was \$41,827.52; the bonds recite an issue of \$50,000. By looking at the assessed valuation, the bond issue and the constitution, the purchaser could see that the issue was invalid.

2d. But if the valuation of 1880 governs, then the limit of indebtedness was increased to \$66,758.83. Then a purchaser would be required to look not only to the assessed valuation and the bond issue, but also to the amount of indebtedness of the county. By looking at these, he would have seen that the county at that time was already indebted to more than four times the total amount of indebtedness that could possibly be incurred, and that any bond issue of this kind would be that much void paper. Under the rule in *Sutliff vs. Lake County*, he would be notified that the bonds were illegal and void, and the recital contained therein could not in any way estop the County from setting up these facts.

Fifth.

The Court erred in holding that Lake County could by receiving the benefits of and paying interest on the bond issue in controversy validate the same.

The Court of Appeals gives as its fourth reason for holding the bonds valid that the county had received full value for the bonds and had ratified any irregularity in their issue by the payment of interest for a number of years. If the position of the Court that the issuance of the bonds in violation of the constitution was a mere irregularity and not the assumption of a power never delegated, the conclusion reached would, of course, follow. But this takes for granted the very point in controversy. Under the constitution the county with or without a vote of the people could not incur a debt by loan in any one year in excess of the prescribed amount. The people had no right to confer authority upon the county officers to borrow more than the sum of \$16,500 at one time, and any attempted authority to borrow \$50,000 would be just as void as the borrowing would be without the vote of authority. The Court confuses irregularity where power existed with action where no power ever did exist. An examination of the cases cited shows this beyond controversy.

Supervisors vs. Schenk, 5 Wallace, 772 was a case where full authority had been conferred by the Illinois statute upon counties to issue bonds in

a certain manner. The bonds issued were authorized by a vote of the people and were in all respects regular, except the vote had been ordered by the County Court instead of by the Board of Supervisors. This Court held that payment of interest for a number of years and accepting the benefits of the bond issue was a ratification and that the bonds were valid in the hands of innocent purchasers for value. No question of want of power was raised or discussed.

County of Clay vs. Society, 104 U. S., 579, decides practically the same thing and is based upon identically the same principle.

Anderson County Commissioners vs. Beal, 113 U. S., 227, arose under an act of the legislature of Kansas. The facts are clearly stated by Mr. Justice Blatchford as follows:

"It is very clear that there was legislative authority, under the act of 1869, for the issuing of the bonds in question. There was an election, and the requisite majority of those who voted assented to the proposition for the subscription to the stock and the issue of the bonds, and the subscription was made by the proper officers, and they issued the bonds, and when it was certified to them that the road was completed to Garrett they authorized the bonds to be delivered to the company, and the bonds were delivered in payment for the subscription and for the stock agreed to be taken. The only question made is as to the notice of the election."

The Court then found the notice of election was perhaps irregular, but that the recitals on the bonds, the acceptance of benefits and payment of interest for ten years estopped the county from setting up this irregularity. Surely no analogy to the case at bar can be found here.

McKee vs. Vernon County, 3 Dillon, 210, was a case decided by Judges Dillon and Krekel. The only point involved, was as to the mere method of making out and delivering bonds that were in all respects valid obligations. Engraved bonds were substituted for printed bonds. The Court held that ratification and payment of interest clearly stopped the county from setting this up as a defense, against a *bona fide* holder. Not a single principle of law relating to municipal securities was raised or discussed.

Portsmouth Bank, vs. City of Springfield, 4, Fed. Rep., 276, was divided by Judge Drummond. He held that bonds issued by the city of Springfield, Ill., were valid and regular, and although there might have been an irregular execution of the powers, conferred it was too late to raise the point after the benefits had been enjoyed for years, and interest had been paid.

Moulton vs. Evansville, 25, Fed. Rep., 382, is the remaining case cited by the Court. This is a decision on some bonds issued by the city of Evansville, Ind. The validity of the same bonds was afterwards passed on by this Court, and this decision

of Judge Woods expressly affirmed. But Judge Woods stated the exact principle for which we contend in a very few words:

"While it is unquestionably true that the payment of interest will not validate a municipal bond issued without authority of law, yet in cases where the objection is not a want of power to issue, but of compliance with a condition, in respect to which there may be an estoppel by recital or other act of the city officials, such payments of interest ought to have, and have been held to have, great weight."

And the very careful opinion of Mr. Justice Harlan, in examining the same questions in this Court, gives no countenance to the doctrines of the Court of Appeals. This Court rested its opinion upon the rentals of the bonds.

Evansville vs. Dennett, 161 U. S., 434.

The position of this Court was clearly and unmistakably stated in another case, evidently considered together with the above cause, and decided upon the same day. Mr. Justice Shiras there stated as the unanimous judgment of this Court:

"While it is true that the mere exchange of new bonds for old ones and the payment of interest on the former by the county authorities would not estop the county from challenging the validity of the new as well as that of the old bonds, yet we think it was competent for the county, in such a state of facts as here existed, by a vote of its people, to waive the condition attached to the original subscription and to estop itself from declining to be bound by the new negotiable securities. It must be admitted, as well-settled law, that where there is a total want of power to subscribe for stock and to issue bonds in payment, a municipality cannot estop itself from raising such a defence by admissions, or by issuing securities negotiable in form, nor even by receiving and enjoying the proceeds of such bonds. So, too, it may be admitted that, even where the power to subscribe for stock and to issue bonds in payment was validly granted, yet where the

right to exercise the power has been subjected to conditions prescribed by the legislature, the municipality cannot dispense with or waive such conditions.

But where the municipality is empowered to subscribe with or without conditions as it may think fit, and where the conditions are such as it chooses to impose, there seems to be no good reason why it may not be competent for such municipality to waive such self-imposed conditions, provided, of course, such waiver is by the municipality acting as the principal, and not by mere agents or official persons. Such was the present case."

Graves vs. Saline County, 161 U. S., 359.

The same rule, however, has been firmly established by other repeated decisions of this Court.

Merchants' Bank vs. Bergen Co., 115 U. S., 384.

Dixon County vs. Field, 111 U. S., 83.

Lake County vs. Graham, 130 U. S., 674.

Hedges vs. Dixon County, 150 U. S.

It is a singular fact that the Circuit Court of Appeals should be forced to sustain its judgment by calling upon this principle which can have no application to the questions involved in this case. The defense set up is a constitutional limitation. Ratification where there was originally no want of power has never been permitted. The dissenting opinion of Judge Thayer upon this point is clear and conclusive. The judgment of this Court in the Dixon County cases from Nebraska and in the case of Litchfield vs. Ballou settles this question beyond controversy. In Litchfield vs. Ballou this Court held that a bill in equity would not lie to recover back from the city, money which had been

obtained from void bonds and invested in a water plant.

Litchfield vs. Ballou, 114 U. S., 190.

Mr. Justice Miller in his usual vigorous language went at the very root of the matter in a few words:

"The language of the constitution is that no city, etc., 'shall be allowed to become *indebted in any manner for any purpose* to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of its taxable property.' It shall not *become indebted*. Shall not incur any pecuniary liability. It shall not do this in *any manner*. Neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for *any purpose*. No matter how urgent, how useful, how unanimous, the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt, in any manner or for any purpose whatever.

If this prohibition is worth anything it is as effectual against the implied as the express promise, and is as binding in a court of chancery as in a court of law."

The same language will answer the entire reasoning of the Court of Appeals in this case. There can be no question but what under the facts the bonds held by Mr. Dudley were issued in excess of the constitutional limit provided in Colorado. It is only the various subterfuges and most strained reasoning that either Court or counsel can escape this conclusion of fact. It is only by engrafting into the constitution something that is not there, and by a forced attempt to do what the Court believes to be equity, that the country can be made to pay a single dollar of these bonds.

We do not believe that this Court will sanction such an attempt.

On the foregoing authorities and under the express language of the Colorado Constitution we submit that the judgment of the Circuit Court of Appeals should be reversed and the judgment of the Circuit Court for the District of Colorado should be affirmed.

Respectfully submitted,

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of Richardson for the Board

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Filed Oct 11 1897

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

THE BOARD OF COUNTY
COMMISSIONERS OF THE
COUNTY OF LAKE AND
STATE OF COLORADO,

Petitioner,

vs.

HARRY H. DUDLEY,

Respondent.

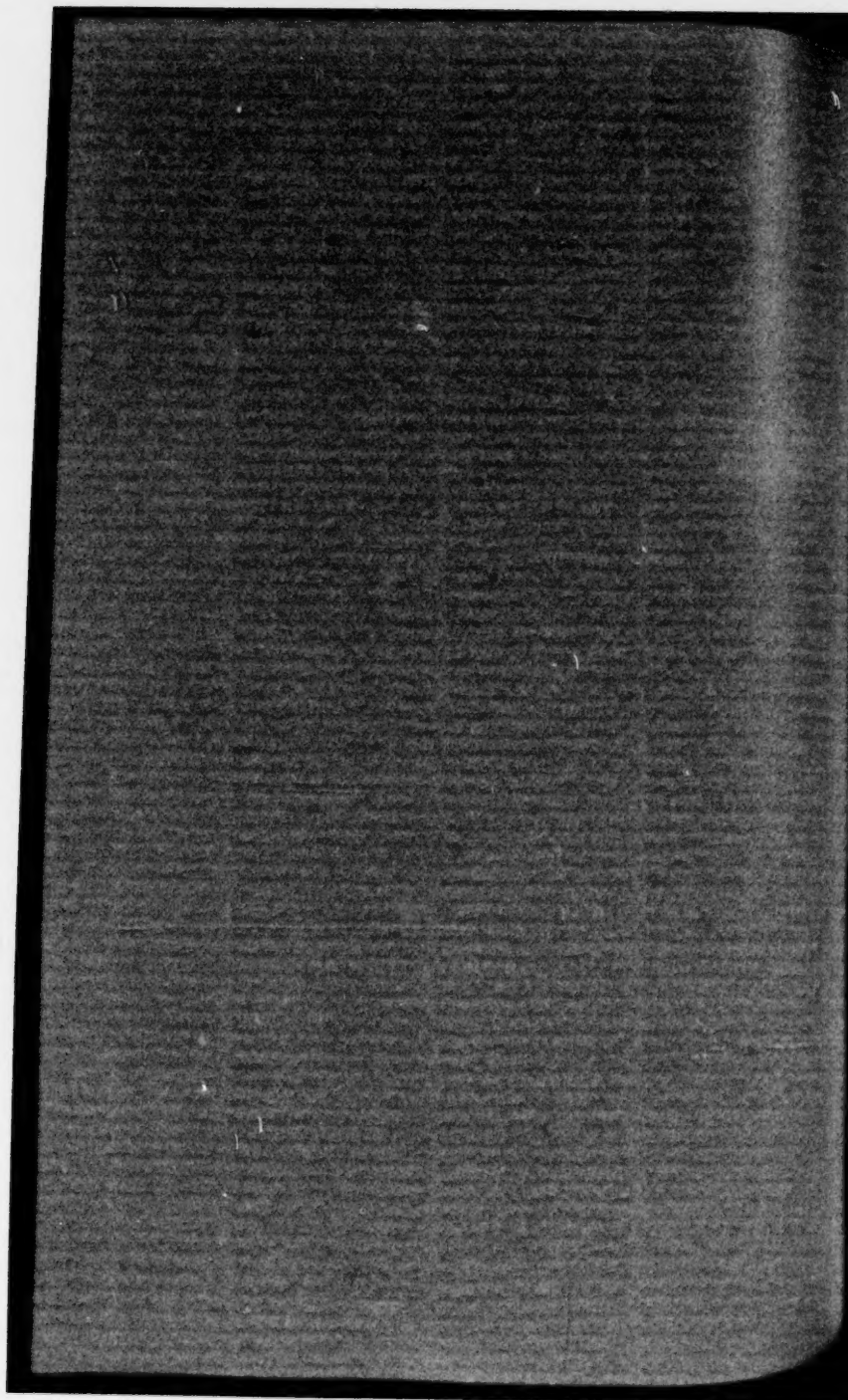
IN OPPOSITION TO THE GRANT-
ING OF THE WRIT OF CERTIORARI.

DANIEL E. PARKS,

H. B. JOHNSON,

EDMUND F. RICHARDSON,

Attorneys for Respondent.



No.

—IN THE—

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

THE BOARD OF COUNTY
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Petitioner,

VS.

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Respondent.

BRIEF IN OPPOSITION TO THE GRANT- ING OF THE WRIT OF CERTIORARI.

It will be well before entering upon a discussion of the merits of the decision which is sought to be set aside by the granting of the writ of *certiorari* herein, to consider the functions of that writ in connection with the decision complained of.

This application is made under one of the clauses of section 6 of the act of March 3, 1891, entitled "An Act to Establish Circuit Courts of Appeal," etc. The language of the clause referred to is as follows:

"And excepting, also, that in any such case as is here-
inbefore made final in the Circuit Court of Appeals it shall
be competent for the Supreme Court to require, by *certio-
rari* or otherwise, any such case to be certified to the Su-
preme Court for its review and determination, with the
same power and authority in the case as if it had been car-
ried by appeal or writ of error to the Supreme Court."

The case at bar is one which is made final in the ap-
pellate jurisdiction of the Circuit Court of Appeals subject
to this excepting clause. The language of the clause is
very broad leaving the question of competency, it is sup-
posed, for the Supreme Court to determine. So far as we
are advised at this distance the rule of practice has not
been well settled by the court as to what the court will
consider competency in determining whether or not the
jurisdiction of the Supreme Court shall attach. It is but
fair to presume that the court will not be swift to take jur-
isdiction under this clause, and if such be true, it would
seem proper to call the attention of the court to the fact
that the decision sought to be reviewed is not one which is
final in its character. The decision, as reported in the 80
Fed. at page 672, orders that "the judgment of the Circuit
Court is accordingly reversed, and the case is remanded
for a new trial." The force and effect of this decision is
wholly interlocutory. It may well be that upon that new
trial a decision will be rendered upon which the Circuit
Court and the Circuit Court of Appeals can agree. When
such an agreement is reached between them it will be suf-

ficiently soon for this court to look it to the record so as to see whether any principle of law heretofore announced by its decisions has been violated. Had the decision of the Circuit Court of Appeals affirmed the judgment of the court below, it might then be said with some degree of propriety that the authority given by the clause in question should be exercised and a final determination of the matter had in this court. We recognize the fact that a decision here reversing the Court of Appeals might become final as to this case, but if after looking into this record it should be determined, either in whole or in part, that the decision of the Court of Appeals should be sustained, the case would necessarily be sent to the Circuit Court for a new trial. Under such a state of facts the time would be but short before this court would again be troubled with an application for a writ of *certiorari*. We therefore suggest to the court that it deny this application and permit the courts below to agree in a decision on the same side and for the same parties. When that is done the loser may then invoke the aid of this court to grant this writ, and make a single and final determination of the entire matter.

Rice vs. Sanger, 144 U. S. 197.

Chicago, etc. Railway Co. vs. Osborne, 146 U. S. 354.

American Construction Co. vs. Jacksonville T. & K. W. Co. 148 U. S. 372, and cases there cited.

Forsyth vs. Hammond, 166 U. S. 506.

With these preliminary observations we pass to a discussion of the petition and brief in support thereof, filed by the Board of County Commissioners of Lake county.

It is broadly asserted that the matters complained of, upon which the writ is expected to go, are four in number.

First: Whether the issue of bonds by the county of Lake here sued upon is void or valid?

Second: Whether this plaintiff is authorized to institute and maintain this action?

Third: Whether the decision sought to be set aside is in conflict with the decisions of this court; and,

Fourth: Whether or not the bonds here in suit are obnoxious to the inhibition of section 6 of article 11 of the constitution of the state of Colorado.

These four propositions, argued at considerable length in the brief, can readily be determined under two heads.

First: Is the plaintiff entitled to maintain this suit.

Second: Under the rules of law, as enshrined in the decisions of the Federal Courts, are these bonds, under the record as it now stands, valid or void.

I.

Is the plaintiff entitled to maintain this suit.

If the proposition in question rests upon the *bona fides* of the plaintiff, as would seem to be the case from the written argument, then it is a complete answer to the argument of counsel to say, that at best such *bona fides* was in

issue and was clearly, therefore, under the testimony both of Mr. Wright and Mr. Rollins, a matter for the determination of the jury, and not for the arbitrary action of the court. If, on the other hand, it be true that Mr. Roberts, the original payee of the bonds, gave for such bonds 95 per cent, as stands undisputed in the record (folio 258) as made by the petitioner, and if it be farther true, as also appears from the record, that Mr. Rollins bought these bonds of Mr. Roberts (folio 70) and gave 92½ per cent for them in cash, without any knowledge that such bonds were tainted with invalidity, then the first position taken by the Court of Appeals is unanswerable, and the authorities cited fully support the doctrine there announced.

It will be remembered that these bonds are negotiable instruments, passing from hand to hand by delivery. The statute then, and until the year 1897, in force in Colorado provides that any bonds "made payable to any person or persons shall be assignable by endorsement thereon under the hand of such person and of his assignee, in the same manner as bills of exchange are, so as absolutely to transfer and vest said property in the purchaser and every assignee successively." And the Supreme Court of Colorado, under the section of the code which provides that every action shall be prosecuted in the name of the real party in interest, have repeatedly decided that the provision of that section is but synonymous with the person who holds the legal title.

First National Bank vs. Hummel, 14 Colo. 275.

Gomer vs. Stockdale, 5 Colo. App. 489.

Even before the code was enacted, it was held that in suing on a promissory note it was unnecessary to allege or

prove the assignment of the note to the person in whose name the suit is brought.

Cody vs. Butterfield, 1 Colo. 385.

Patton vs. Coen *et al.* 3 Colo. 269.

And these cases were followed in

Board vs. Sloan, 5 Colo. 39.

It is enough to say on this branch of the case that E. H. Rollins & Sons were acting as the brokers or agents and custodians for the bonds and coupons in question belonging to the plaintiff. And since the Act of Congress of March 3, 1875, as amended by section 1 of the Act of 1887, has been in force, it is difficult to determine what difference it makes, where the paper sued on is made by a corporation, whether the grantor had any right to maintain a suit in the federal court or not. The jurisdiction is governed under that section by the character of the paper sued on; and where title to such paper passed by delivery, as in this case, a complaint that a conveyance of the paper was made without consideration for the express purpose of giving the federal court jurisdiction, would be without foundation even if it were true, which no where appears.

Newgass vs. New Orleans, 33 Fed. Rep. 199.

Rollins vs. Chaffee Co. 34 Fed. Rep. 93.

Jerome vs. Commissioners, 18 Fed. 873.

Perrine vs. Town of Thompson, 17 Blatchford,
19

City of Lexington vs. Butler, 14 Wallace, 283.

Commissioners vs. Bolles, 94 U. S. 104.

In the case last cited the action was upon bonds, a portion of which were owned by other persons, who simply

deposited them with the plaintiff for collection. The court upheld the right to maintain the suit, upon the ground that their predecessors in ownership were *bona fide* owners, and that the plaintiff had succeeded to their rights, and the ground of such *bona fides* was distinctly placed upon the proposition that the railroad company gave for the bonds and coupons an equal amount of stock, which the county held at the time suit was brought. If such a position was taken in that case, what may we say of Mr. Roberts who paid 95 per cent of the face value of these bonds, or of Mr. Rollins who thereafter paid Mr. Roberts 92½ per cent of the face value.

The case which is relied upon to defeat plaintiff's right to maintain this suit, on the question of *bona fides*, is that of Lytle vs. Lansing, 147 U. S. 59. A mere glance at that case is sufficient to convince the court that it does not warrant the position taken by counsel. In the masterly analysis of Mr. Justice Brown, several things appear which do not appear in this case. First, it will be seen that "the actual illegality of the paper (was) established." Next, it was held that "in such a case (it being incumbent upon the plaintiff to show that it was a *bona fide* holder) the plaintiff fulfils all the requirements of the law by showing that either he or some person through whom he derived title was a *bona fide* purchaser for value without notice." Having recognized these general principals, it was then determined: First, that the people who originally got the bonds never purchased them and never took title to them; Second, that when they transferred the bonds to Elliott, Collins & Co. that firm took them under precisely the same conditions and with the same knowledge that their grantors held them; Third, that Elliott, Collins & Co. either direct-

ly or indirectly, transferred them to one John J. Stewart, and that the record disclosed "no evidence whatever to show how Stewart became possessed of them, or that he gave value for them, or that he took them without notice of their original invalidity, and that no one knew Stewart, no one had ever seen him, and that if any sale was actually made it was made at an enormous discount." Taking all those things into consideration, it is not strange that Stewart was held in a suit by him on the coupons to be not a *bona fide* purchaser. The bonds then went to one Breckenridge, who claimed to have paid \$50,000 for them by check, which was produced by the cashier of the bank upon which it was drawn, instead of Breckenridge, under testimony which showed there was no special agreement for the purchase of the bonds, and Breckenridge knew at the time of purchase that the coupons and bonds had been declared invalid in the state courts. This man Breckenridge afterwards transferred them to the plaintiff, Mr. Lytle, for an interest in a farm, with full knowledge on Lytle's part of all of the matters and things which had gone before. It was held that such knowledge was fatal to Lytle's recovery; that he did not follow up the matters and things brought to his attention by his grantor, even if his purchase had been a *bona fide* purchase otherwise, which was a matter admitting of such grave doubt that it is plain to be seen from reading the decision that no one had believed that there was any conveyance to Mr. Lytle at all. The whole opinion of the court is based upon the proposition that the town of Lansing never got value, nor anything of value, for the bonds which it had purported to issue, and that the supposed bonds were gotten from the town by false and fraudulent representations.

But we are satisfied that we can add nothing to the language of the Court of Appeals in the first proposition of their decision upon this subject. A reading of the record left no doubt in the minds of every individual who composed that court, as it will leave no doubt in the minds of the individuals who compose this court, that there was no serious question touching the *bona fides* of the plaintiff's grantors. In any event, as we said before, it would be a question for a jury, which would necessitate a reversal of this case.

We think it is clear that the distinction between this case and the one of *Farmington vs. Pillsbury*, 114 U. S. 138, is of such a character that it requires no argument to show that the latter case forms no precedent for the government of the one at bar. There the Supreme Court of Maine had jurisdiction, and had declared all of the bonds void, and had in effect directed them to be surrendered up to be canceled, and with full knowledge of that decision, and for the express purpose of giving the Federal court jurisdiction, and prior to the act of March 3, 1888, hereinbefore referred to, a nominal plaintiff was found in Massachusetts to maintain the action for the express purpose of avoiding the decision of the Supreme Court of Maine. It further appears from the decision that the bonds there under consideration were in the nature of a donation in aid of the Androscoggin railroad company.

There has ever been a grave and substantial distinction drawn between that class of cases which have found their way to the Supreme Court, where the municipality received absolutely nothing for the bonds sought to be enforced, and where the municipality received value for the bonds issued, and later on sought to escape the payment of

its otherwise just obligations because of some constitutional or statutory inhibition in the manner or matter of issuing said bonds. We are unable to find a case where the payment of ninety-five per cent of the face value of such security has been held not to be an evidence of good faith on the part of the party purchasing the bonds, and we think counsel, with all of their ability and industry, will be unable to show one.

II.

Under the rules of law, as enshrined in the decisions of the Federal Courts, are these bonds, under the record as it now stands, valid or void?

The total issue of the bonds, some of the coupons of which are here sued upon, was an issue of \$50,000. The bonds recite upon their face the total amount of the series, the date of the election under which the bonds were issued, and a certificate that all of the provisions of the act under which the bonds were issued were fully complied with by the proper officers. A copy of sections 20, 21, 22, 23, 24 and 25 of the act of March 24, 1877, the same being the sections of the act under which the bonds were issued, was printed upon the back of each bond.

Section 6 of Article 11 of the Colorado Constitution, as it was in force at the time these bonds were issued, was as follows:

“No county shall contract any debt by loan in any form, except for the purpose of erecting necessary public

buildings, making or repairing public roads and bridges, and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county following, to-wit: Counties in which the assessed valuation of taxable property shall exceed five millions of dollars, \$1.50 on each thousand thereof; counties in which such valuation shall be less than five million dollars, \$3 on each thousand dollars thereof. And the aggregate amount of indebtedness of any county for all purposes, *exclusive of debts contracted before the adoption of this constitution*, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not exceed twice the rate upon the valuation last herein mentioned: *Provided, that this section shall not apply to counties having a valuation of less than one million of dollars.*"

It is claimed by counsel with great vehemence that the bonds in suit, owing to the fact that they recite upon their face that they are for the total sum of \$50,000, are obnoxious to this constitutional inhibition by the rule laid down in *Dixon County vs. Field*, and similar cases. It is conceded that as an actual matter of fact the bonds embraced in this issue were not and could not have been delivered by the county to the grantee named in the bonds

until sometime after the sixth day of September, 1880. It is further conceded by counsel that at that time the assessment which governed the amount of indebtedness that could be contracted by the county was the assessment of 1880, under the doctrine of the case of *Lake County vs. Standley*, 49 Pac. 23, recently decided by the Supreme Court of Colorado. It is further conceded that if the date of the *delivery* of the bonds is to control, then a total indebtedness of sixty-six thousand and odd dollars could be contracted by Lake County within the constitutional inhibition. That the date of the delivery does control is made apparent by the following authorities:

Teidman Neg. Paper, §§ 10, 11 and 34.

Anthony County vs. Jasper, 101 U. S. 693.

Coler vs. Cleburne, 131 U. S. 162.

Town of Weyamorga vs. Ayling, 99 U. S. 112.

Jesler vs. City of Seattle, 25 Pac. 1014.

Louisiana vs. Wood, 102 U. S. 294.

If such be the case, there is nothing on the face of the bonds which brings this case within the rule laid down in *Dixon County vs. Field*. The distinction which exists in that case is so apparent that it is inexplicable how the pretended confusion which seems to exist could have arisen among the members of the bar who have since that time been engaged in litigation touching the municipal indebtedness of the various counties of Colorado.

Section 2 of Article 12 of the constitution of Nebraska is set forth on page 87 of the case of *Dixon County vs. Field*, in 111 U. S. It will be seen on an examination of that provision that the aggregate of indebtedness should not exceed 10 per cent of the assessed valuation of the

county. There was one thing only to be ascertained by the proposed purchaser of Dixon county bonds, viz. the assessed valuation, a thing required by statute to be kept, and not only by statute, but it is especially referred to in the constitution itself. The purchaser of bonds in that case was advised upon the face of them that the total issue was \$87,000. The assessed valuation of the county for that year was \$587,331, and it was held, and rightfully, that inasmuch as a computation could determine the question of the excess of the issue, there could be no such thing as an innocent purchaser of the bonds.

Now, let us examine the section of the Colorado constitution above quoted. It will be observed in the first place that in computing the amount of indebtedness which any county could have under this constitutional inhibition, there were two exceptions applied to this case, viz.: First, all debts which were contracted before the adoption of the constitution should be excluded. Second, the section of the constitution had no applicability to counties having a valuation of less than one million of dollars. While it was true that Lake county was created by the act of February 8, 1879, (see pp. 45, 46, 47 and 48, Sess. Laws Colo. 1879,) and therefore became a county later than the adoption of the constitution, it is equally true, as will be seen by an examination of the provisions creating it, that it was carved out of the old county of Lake, which was in existence from the time of the formation of the territory. Sess. Laws 61, p. 57, sec. 33; section 35 of chapter 20 of the laws of 1868. Lake county was, by the terms of the act and section 4 of Article XIV of the constitution, required to pay its proportion of the existing indebtedness of the old county of Lake prior to the formation of the present

county, and whatever amount there was of such indebtedness would at no time be affected by this constitutional provision. See sec. 8, Sess. Laws Colo. 1879. At some time in the history of Lake county, or the county out of which it was carved, it had a valuation of less than one million of dollars. Whatever indebtedness existed at the time of reaching the one million dollar limit, or before the adoption of the constitution, the foregoing section had no application to. Hence, a purchaser of Lake county bonds, examining the face of the bonds, would see that the proposed issue was \$50,000. He would equally see that it was possible for Lake county to have \$16,000 odd of indebtedness under the constitutional limitation and the assessed valuation over and above the amount of these bonds. He would with equal clearness ascertain that the amount of indebtedness as Lake county had before it reached the one million dollar limit could be added to that \$66,000 odd. He would also rely upon whatever indebtedness it may have had prior to the adoption of the constitution of 1876, being added to that. Now, if that be true, in the light of anything which appears in this record, from an examination of the evidence rejected as well as the evidence admitted, who can say what the legal limit of indebtedness was on the 6th day of September, A. D. 1880? Counsel seem to think that a mere computation of a certain percentage on the assessed valuation of Lake county will determine that question. Palpably this is not so. If that is true counsel fails to point out wherein there is anything in the record which changes the rule that constructive notice can never be broader than actual notice. Admitting that respondent is charged with constructive notice of the amount of the outstanding indebtedness of

Lake county, as claimed by the petitioner, how much of that indebtedness was contracted before the adoption of the constitution? How much of it prior to the time that Lake county reached the one million dollar valuation? Hence any indebtedness which the county had would be presumed to be valid until the contrary be made to appear, which nowhere does appear. The argument of counsel would seem to indicate that the presumption obtains that these bonds are void, and the burden is upon the owner and holder of them to establish their validity beyond a reasonable doubt. Such is not the rule which obtains with this class of paper. Every presumption and intendment is in favor of the validity of the bonds and of the coupons thereto attached, and it is only by specific evidence, the burden of producing which is upon the county, that this presumption can be overcome. How does this county attempt to overcome it? It introduces the county clerk's warrant register. Whoever held that the warrant register provided to be kept by the county clerk is such a book as is required to be noticed by a proposed purchaser of bonds? But even suppose that he was obliged to take notice of it, of what fact could it advise him? Section 44 of the act of March 24, 1877, provides that the county clerk "shall not sign or issue any county order, unless ordered by the board of commissioners authorizing the same; and every such order shall be numbered, and the date, amount, and number of the same, and the name of the person to whom it is issued, shall be entered in a book kept by him in his office for that purpose." A purchaser of bonds examining this book would be advised that on certain days certain warrants were issued by the county. There would be no notice whatever to advise him when the

indebtedness was contracted which was represented by that warrant. It is too well settled to admit of doubt that the date of the contract is what determines the validity or invalidity of a county's debts under this section of the constitution.

People vs. Wilder, 41 Fed. 512.

Lake County vs. Standley, 49 Pac. 23.

So that while it might be true that a proposed purchaser of bonds could have seen, had he examined the so-called county warrant registry, that the issuance of county warrants was taking place from day to day and from month to month, he could not have told from an inspection of that book when the indebtedness was contracted which was represented by the warrant so issued; and he furthermore could not have ascertained from any such book, or from any book introduced or sought to be introduced in this case, the amount of the old warrants which were daily being taken up and canceled under the provisions of the law which are of equal force and effect with the keeping of this warrant register. It is, therefore, a matter which admits of no doubt that the warrant register can in no manner show what the indebtedness of a county is. Its purpose is to show the amounts of warrants issued between given dates. Now, a warrant is issued exactly the same whether there is money in the treasury to pay the warrant or not. If there be money in the treasury against which the warrant is drawn, there could in no wise be any indebtedness represented thereby. If a warrant be but the evidence of a pre-existing debt, then the date of the contraction of that indebtedness would be the matter which would have to be determined

under the constitutional inhibition. By the terms of the act under consideration it becomes the duty of the board of county commissioners of each county to "make out semi-annual statements at the regular sessions in January and July, at which times they shall have such statements published in some weekly newspaper published in the county, if there be such published, and if there be no newspaper published in the county, such commissioners shall cause such statements to be posted in three conspicuous places in said county, one of which shall be the court house door: and such statement shall show the amount of debt owing by their county, in what the debt consists, what payments, if any, have been made upon the same, the rate of interest that such debts are drawing, also a detailed account of the receipts and expenditures of the county for the preceding months, in which shall be shown from what offices and on what account any money has been received and the amounts, and to what individuals and on what account any money has been paid, and the amounts; and shall strike the balance, showing the amount deficit, if any, and the balance in the treasury, if any, and the statement thus made, in addition to being published as before specified, shall also be entered of record by the clerk of the board of county commissioners in a book to be by him kept for that purpose only, which book shall be open to the inspection of the public at all times." Wherein does this record, attempting as it does to charge us with constructive notice, comply with the terms and conditions of this section? For a period of a certain six months, which is thought to cover this transaction, there was some evidence of a publication in a weekly newspaper published at Leadville, but of such an

unsatisfactory character that it could not be received (fol. 266). In the ensuing six months there was a record which in every essential particular failed to comply with the statute, as will be seen by an examination of the record kept by the county clerk and recorder in connection with the statute, but no evidence of any publication whatsoever. If we are to be charged with constructive notice, then it must be the notice called for by the statute under which the bonds are issued. It is too palpable that any and all of the records of Lake county taken together would not enable the most astute person, from an examination of them, to determine what, if any, illegal indebtedness of Lake county existed. While he might be advised that the gross sum was in excess of a certain percentage of the assessed valuation, there was nothing to show of what the indebtedness consisted, or when it was contracted. It is not necessary to pursue this analysis further.

We might elaborate upon the proposition that under the statutes counties are constantly liquidating warrants upon receipt of funds in the county treasury, and boards of commissioners are constantly issuing new warrants. If the new warrants so issued should be for indebtedness contracted at a time after old warrants have been liquidated by payment, assuming that the county was below or at (for it could never be above) the limit of its indebtedness, if the amount so issued were within the amount redeemed, such warrants would be perfectly valid. The void warrants, if any there were issued in excess of such amount, would be void for all purposes, and they could not be used by the county for any purpose whatsoever. It is a strange and anomalous condition of law which, in

some of the minor jurisdictions is too prevalent, that allows all of the warrants of a county, legal or illegal, to be used as a constitutional barrier to the enforcement of the particular indebtedness sued upon, and in turn when other and different obligations are in suit to permit alleged indebtedness, which has long since been declared invalid, to serve a like purpose to defeat such new suit.

We thus pay particular attention to the difference which exists between our constitution and the constitution of Nebraska, for unless counsel can bring this case within the doctrine announced in *Dixon County vs. Field*, they practically concede that they are without standing either in this case or upon this application.

One thing is certain, in the face of constitutional inhibition, bonds are held by this court to be valid, and innocent purchasers of them are protected where the county has received value, even though the amount of such bonds be beyond the limit.

Buchanan vs. Litchfield, 102 U. S. 290.

Pana vs. Bowler, 107 U. S. 539.

Oregon vs. Jennings, 119 U. S. 74.

Chaffee County vs. Potter, 142 U. S. 364.

In *Chaffee County vs. Potter*, *supra*, this court held under this same provision of this same constitution, an issue of bonds which were in excess of the limit entirely valid because of the recitals, and that too without invoking the aid in any way of the exceptions in the constitution above pointed out, which make it impossible for a purchaser to determine the amount of legal or illegal indebtedness of any county within this state.

The point to which we wish especially to direct the at-

tention of the court is, that inasmuch as the constitution provides that a certain limit shall not be exceeded as to indebtedness, and inasmuch as it provides certain exceptions which shall not be counted in ascertaining what that indebtedness is, that it was perfectly competent for the legislature, to provide, as they did by section 30 of the act in question, that a financial statement should be made semi-annually showing *in what the indebtedness consisted*," so that a purchaser of bonds attempted to be issued under that act could determine from this semi-annual statement if his bonds were within the constitutional limit. If then the authority must be lodged somewhere to determine in what the indebtedness of the county consists, the nature and character of it, etc., as is prescribed by section 30 of the act, that power can be properly lodged in a board of county commissioners. If it is lodged there, and if an inspection of the record, either made or implied, will fail to show the one who proposed to deal with the county, that the county has either reached or exceeded its limit of indebtedness, or that any of such indebtedness is within the constitutional inhibition, then under the doctrine of *Chaffee County vs. Potter*, and similar decisions, the determination reached by the Court of Appeals is just.

Nor is there anything in the *Sutliff* case, found in 147 U. S. 231, which militates against this doctrine. The stipulated facts upon which it was certified shows that the county was contracting indebtedness greater than that permitted by the limitation contained in the constitution and statute of Colorado. The plaintiff in that case admitted that fact, and that the indebtedness thereby created was in excess of the constitutional limitation, but relied upon the recitals in his bond and the fact that he had no

actual notice of such indebtedness. The Supreme Court, therefore, assumed under that admission that section 30 of the act was fully complied with, and that if the plaintiff in that cause had examined the record, which was assumed to be kept under section 30, he would have ascertained that his bonds were in excess of the constitutional limitation and therefore void.

In the case at bar we call for the record and notice as provided by section 30, and behold it is not in existence. If, then, constructive notice can never be broader than actual notice, and if the plaintiff in that case could have had no actual notice, then he simply stipulated away his right to a recovery, and as the Court of Appeals well say, the very thing which "was assumed and not questioned in the Sutliff case" is clearly shown not to exist in this case, covering any of the time which could affect the legality of these bonds. Nor does the awful consequence ensue, which is predicted by counsel, viz that the Supreme Court have declared that \$5,000 of the issue of bonds created by the same vote to be void, while the Court of Appeals in this decision declare \$50,000 to be valid. The Supreme Court decided the case which was before it, as made by the parties to the case. On other and different coupons, under evidence which would be the same as in the case at bar, it requires no prophet to foretell that the Supreme Court, when again called upon, will not hesitate to assert the validity of the bonds, which counsel in the former case virtually stipulated out of court.

The distinction which ought to be fixed in mind between the doctrine relied upon by counsel in *Buchanan vs. Litchfield*, 102 U. S. 290, and similar cases, and the one at bar is this. In those cases a purchaser of bonds was

held to know that there *must be such a thing as an assessed valuation*; but no case has held that anyone must be presumed to know that there is a debt or that he must *presume* that debt invalid if there be one. If the books do not reveal that such assessed valuation had been made, then the purchaser of bonds must take his chances upon the fact that an assessment, when made, would show either the one thing or the other as affecting the validity of the bonds which is proposed to be purchased. It is not necessary that a county shall have a debt. It is necessary that it shall have an assessed valuation. The presumption which obtains in the one case is not applicable in the other, and unless the record called for by the section enacted in connection with the issuance of these bonds, which gives to the county commissioners the power, and places upon them the duty, of making out these statements, is complied with, a purchaser of bonds has a right to rely upon the recital "that all of the provisions of said act have been fully complied with by the proper officers in the issuance of this bond." *One of the provisions of this act (Sec. 21) reiterates in express terms the limit provided for by the constitution.* If the argument be carried to its logical conclusion, then the constitutional inhibition relating to indebtedness is so sacred that no escape can occur under it, no matter what the recitals of the bond may be. If that were true, there might be an end to the contention in this case, but as we have already seen in the face of this express constitutional inhibition the Chaffee County bonds were held to be valid, and in scores of similiar cases the same result has been obtained. Hence, we need not follow that portion of counsel's argument which is addressed to the consideration of these questions. Nor is the true distinction drawn,

by counsel, in our opinion, in such a case as *Hedges vs. Dixon County*, 150 U. S. 182. Under that constitutional provision the bonds were sought to be issued in express and open violation of it. Here the power to issue the bonds exists, and the amount is expressly authorized by a vote of the people. The amount is to be ascertained within which such bonds may be lawfully issued by the board of County Commissioners of the various counties issuing them. There the Board of County Commissioners had nothing to do with the matter in any way, shape or form. The constitution fixed the limit. There were no exceptions, and everyone could ascertain for himself just as well as the Board of County Commissioners could ascertain for itself the lawful amount.

This brings us to a consideration of the only remaining matter, and that is, whether or not the bonds sought to be issued by Lake county should have been issued in at least two separate years.

It will be observed that Judge Thayer did not dissent from any other proposition decided by the Court of Appeals. Hence, much of the argument which is addressed to the consideration of the *bona fide* purchaser or of the right of plaintiff to maintain the suit, or of the true judicial value of the publication and the warrant register sought to be introduced in evidence, lose much of their force; but Judge Thayer did dissent upon the single proposition of the amount of the indebtedness which could be incurred under this bond issue in any one year. We do not believe that we can add anything to the very lucid and able exposition of Judge Lochren, concurred in by Judge Sanborn; but it seems to us that neither the case of *Lake Co. vs. Rollins*, 130 U. S. 662, or *People vs. May*,

9 Colo. 80, warrants the inference drawn therefrom by Judge Thayer. In the Rollins case, as well as the May case, the single and only question before the court was whether or not the constitutional inhibition governed as applied to the aggregate amount, or the amount which could be contracted by loan only, and not whether or not the aggregate amount of indebtedness which could be had without a vote and the aggregate amount which could be had with a vote were both governed by the clause relating to the amount which could be contracted in any one year. The constitution was enacted as a limitation upon the servants of the people. It was thought by the form of that enactment, from the language they used, that when those servants were engaged in running in debt it would be well to place a limit upon the amount which they could contract, and it would be quite as wise to divide this amount by two and prescribe that the quotient only could be contracted in any one year. In the language of Mr. Justice Lamar, after having done this, they then passed to a broader subject, and after discussing the *modus operandi* to be pursued in the creation of a greater indebtedness, they fix the aggregate limit of debt which could be created by vote to double the aggregate amount which had theretofore been provided for without a vote. In other words, the constitution recognized that emergencies might arise when it would not be safe for the representatives of the people to create indebtedness without the distinct sanction of the people themselves. Now, when this direct sanction is obtained, as in this case, wherein is the logic or the sense of saying that the people themselves, who made the constitution, should be limited as to the amount which they should contract in any one

year, by holding the first provision of the section to be a limitation upon the last portion. The language of the latter portion refers only to the *rate* upon the valuation last above mentioned, it does not refer to the *time* last above mentioned, and we contend that had it been the intention of the framers of that section to limit the question of *time*, as well as the question of *rate*, they would have said so in the one case as they did in the other. Owing to the fact that they did not say so, and owing to the further fact that such a construction would compel the absurd conclusion either that an issue of bonds must be made one-half on the last day of one year and one-half on the first day of the year following, as is ludicrously suggested by counsel in their brief, or that a total of the indebtedness sought to be contracted in a given period could only be contracted in installments, as is suggested by Judge Thayer in his dissenting opinion, we are constrained to believe that the broad, common sense view which has been taken by Judge Lochren if again passed upon by this court will be upheld.

We have thus far assumed, in accordance with the probable position of Judge Thayer in his dissenting opinion, that these bonds represented a debt *by loan*. While the orders of the board speak of contracting a debt by loan, it will be clearly seen from the manner in which the bonds were actually disposed of that no debt *by loan* was ever contracted. The larger part of the bonds were paid directly to the contractor who built the court house and the balance, after they had been issued, were sold for cash. The distinction between the contraction of a debt by loan and the issuance of bonds to pay or secure the same, and the sale of bonds on the market after they have

been issued, is broad and clear. In the one case money is borrowed and the bond is issued to pay or secure it; in the other the bond is issued in advance and sold as a piece of chattel property for what it will bring.

City of Brenham vs. German Am. Bank, 144
U. S. 173.

Merrill vs. Monticello, 138 U. S. 673.

Ashuelot National Bank vs. School Dist. 56
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Simonton Municipal Bonds, §§ 142-4.

In concluding this brief we desire to say that lack of time has compelled an exceedingly hasty preparation of it. We do not consent to any of the statements contained either in the petition for the writ or the brief in support thereof emanating from counsel on the other side, save and except insofar as the same are sustained by the record proper. Under the ingenious presentation of counsel many of the facts appearing in the record are entirely suppressed, and others can only be viewed in the proper light by taking them in connection with the facts accompanying their presentation. But of these matters we have treated fully in our briefs which were filed in the court below, a few copies of which, we ask leave to file herewith and have considered in connection with the remarks here made.

Respectfully submitted.

DANIEL E. PARKS,

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Attorneys for Respondent.

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No. 9
Supreme

Filed Nov 15 1899

THE BOARD OF COUNTY COMMISSIONERS OF THE
COUNTY OF LAKE COUNTY, ILL.

HARRY H. DUDLEY

On Writ of Habeas Corpus, Return of Writ of Habeas Corpus
for Arrest and Return of Prisoner

Brief for Harry H. Dudley

JOHN F. DELON
HARRY HUBBARD
JOHN W. DILLON
EDMUND E. RICHARDSON

CHIEF

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The following table shows the results of the
analysis of the various samples of the
material, and it will be seen that the
composition is very uniform.

Supreme Court of the United States,

OCTOBER TERM, 1898.

No. 177.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE,
Colorado,

Petitioner,

VS.

HARRY H. DUDLEY.

ON WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR HARRY H. DUDLEY.

Statement of the Case.

We here print as our statement of the case (inserting in brackets our references to the record) the statement made by the United States Circuit Court of Appeals as follows (Record, p. 142) :

"This action was brought to recover the amount of a large number of coupons, aggregating \$26,500 exclusive of interest, which had formed part of and been attached to bonds of said County of Lake, in the State of Colorado, which had been issued to the amount of \$50,000, on or after September 6, 1880, but bearing date July 31, 1880, for the purpose of erecting necessary public buildings for said county. Said bonds bore interest at the rate of ten per cent per annum, payable

annually on the first day of April of each year, at the office of the County Treasurer of said county, upon delivery of the attached interest coupons. The bonds were redeemable at the pleasure of the county after ten years, and were due and payable at the office of the County Treasurer twenty years from the date thereof. [Complaint, Record, pp. 3-8; Evidence, Record, p. 26.]

The coupons maturing upon these bonds before April 1, 1884, were all paid as they matured, at the office of said County Treasurer, but no coupons maturing at or after that date have been paid, the coupons sued on being among those unpaid. [Complaint, Record, p. 5; Answer, Record, p. 11.]

The answer of the defendant denied knowledge or information sufficient to form a belief as to whether plaintiff was the owner and holder of any of the coupons, or had become the purchaser of them for a valuable consideration, without notice of any claim affecting their validity. [Record, p. 10.]

But the principal defense, variously stated in the answer, was, in substance, that under the Constitution and laws of the State of Colorado, the Board of County Commissioners of the said County of Lake had not, when they issued said bonds, any power or lawful authority to issue the same, for the alleged reason that by the issue of such bonds a debt of said county was contracted, or the prior debt of said county increased, to an amount prohibited by the Constitution of said State, and that from the existing facts and circumstances shown by the records of said county, all purchasers of said bonds were bound to take notice of their invalidity. [Answer, Record, pp. 11-15.]

Section 6 of Article XI of the Constitution of Colorado, as it stood prior to the year 1888, was as follows:

"No county shall contract any debt by loan in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads, and bridges, and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county, following, to wit: Counties in which the assessed valuation of taxable property shall exceed five millions of dollars, \$1.50 on each thousand thereof; counties in which such valuation shall be less than five millions of dollars, \$3.00 on each thousand dollars thereof. And the aggregate amount

of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this Constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not exceed twice the rate upon the valuation last herein mentioned: provided, that this section shall not apply to counties having a valuation of less than one million of dollars.

The said bonds contained a recital upon the face of each bond, as follows [Record, pp. 4, 26]:

"This bond is one of a series of fifty thousand dollars, which the Board of County Commissioners of said county have issued for the purpose of erecting necessary public buildings, by virtue of and in compliance with a vote of the majority of the qualified voters of said county, at an election duly held on the 7th day of October, A. D. 1879, and under and by virtue of and in compliance with an act of the General Assembly of the State of Colorado, entitled 'An act concerning Counties, County officers and County Governments, and repealing laws on those subjects,' approved March 24th, A. D. 1877, and it is hereby certified that all the provisions of said act have been fully complied with by the proper officers in the issuing of this bond."

Secs. 20 to 25 inclusive of said act were also printed upon said bonds [Record, pp. 27-29], and contained all the provisions of said act, relative to the action of the Board of County Commissioners in determining upon the necessity of creating an indebtedness for the purpose of erecting necessary public buildings, making or repairing roads and bridges, and by order specifying the amount required, and submitting the question of incurring the debt to a vote of the qualified electors at a general election, by posting of notices; also prescribing the form of ballots and manner of voting and canvassing the vote, and the authority of the County Commissioners in case the vote should be carried to contract the indebted-

edness, and the limitations upon such authority, and the form and purport of the bonds to be issued, and provision to be made for the payment of the interest and principal of the bonds, and a provision that they should not be sold at a discount of more than fifteen per cent of their par value.

Sec. 21 of said act contained a provision, as follows: "Provided, that the aggregate amount of indebtedness of any country exclusive of debts contracted prior to July first, 1876, in which the assessed valuation of property shall exceed one million of dollars, for all purposes, shall not be in excess of the following ratio, to wit: Counties in which the assessed valuation of property shall exceed five million of dollars, \$6.00 on each thousand dollars thereof; counties in which the assessed valuation of property shall be less than five millions, and exceed one million of dollars, \$12.00 on each thousand dollars thereof."

The action of the Board of County Commissioners preliminary to and in submitting to vote of the qualified electors of said county, at the general election held October 7, 1879, the question of creating an indebtedness of \$50,000, for the purpose of erecting necessary public buildings, and \$5,000, for the building and construction of public roads and bridges, was strictly in conformity with said act. [Record, pp. 81-95.] The election was duly held, and the vote on that question duly had and canvassed and found and declared to be carried. [Record, p. 93.] And all the acts and doings were properly recorded, and the bonds prepared, executed and issued in strict accordance with the provisions of said act. And the bonds were sold for ninety-five cents on the dollar of their par value, [Record, pp. 80, 90, 91, 94-95, 32-33] and have, since within one year of their issue, been held and owned by purchasers for full value without actual notice of any illegality or infirmity in said bonds. [Record, p. 40.] The plaintiff is the holder of the coupons sued upon, by delivery of the same with properly executed written assignments thereof to him, by the former owners of such coupons, but without payment by him of any amount therefor [Record, pp. 33-38.]

The assessed valuation of taxable property in said County of Lake for the year 1879 was \$3,485,628, and for the year 1880 was \$11,124,489, and such assessment was completed on the first day of September in each

of said years by the action of the Board of Equalization. [Record, p. 47.]

Sec. 30 of the act above referred to made it the duty of the Board of County Commissioners of each county to make out semi-annual statements at the regular sessions in January and July, and publish them in some weekly newspaper published in the county, or if no such newspaper be so published, to cause such statements to be posted in three conspicuous places in the county, one being the court-house door, showing the amount of debt owing by the county, in what it consists, what payments have been thereon, the rate of interest, and a detailed account of receipts and expenditures for the preceeding months, and striking a balance showing the deficit or the balance in the treasury. "And the statement thus made, in addition to being published as before specified, shall also be entered of record by the Clerk of the Board of County Commissioners, in a book to be kept by him for that purpose only, which book shall be kept open to the inspection of the public at all times." There was no evidence in the case that any such semi-annual statement made by the Board of County Commissioners for said County of Lake at the January or July sessions of said board in the year 1880, had ever been entered of record in any book kept for that purpose only, as required by said act. The fair inference from the testimony is that no such record was ever made.

Upon the trial, the defendant to prove its allegation that on July 31, 1880, the date of said bonds, and also at the time they were issued, the aggregate outstanding indebtedness of said County of Lake was largely in excess of the amount of the extreme limitation fixed by the Constitution of said State, and the ¹et aforesaid, offered in evidence a book kept in the years 1880 and 1881 by the County Clerk of said Lake County, called the "County Clerk's Account Book," and purporting to contain, among other things, detailed statements of the financial condition of said county on January 1, 1880, July 1, 1880, and January 1, 1881, and the same was admitted in evidence by the court, over the objection and exception of plaintiff, that it was not the record provided for by said act, nor the semi-annual statement of the board required by said act. [Record, p. 63 *et seq.*] Much other evidence tending to show the existence of outstanding warrants and indebtedness of said county at the time of issuing said bonds, to an

amount largely in excess of the aggregate amount of indebtedness which the county could, under said constitutional limitations, lawfully incur, was offered by defendant, and admitted by the court, over the objections of the plaintiff that the same was incompetent and immaterial. [Record, p. 73 *et seq.*]

At the conclusion of the evidence, the court refused all of the plaintiff's requests for instructions to the jury, and instructed the jury to return a verdict for the defendant; to which refusal and instruction exceptions were duly taken by the plaintiff. [Record, p. 113-114] The jury accordingly found for the defendant, and judgment for the defendant was entered upon the verdict. [Record, pp. 114-115, 17.]

WRIT OF ERROR TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.—The plaintiff obtained an allowance of a bill of exceptions (Record, pp. 18-116), which expressly states that it contains all the evidence (Record, p. 113), and sued out a writ of error to the United States Circuit Court of Appeals (Record, p. 135), and filed an assignment of errors (Record, pp. 117-230). The United States Circuit Court of Appeals heard the case on writ of error, and rendered judgment reversing the judgment of the Circuit Court, and sending the case back for a new trial (Record, p. 152; opinion of the court, record, pp. 142-152).

PETITION FOR REHEARING IN THE UNITED STATES CIRCUIT COURT OF APPEALS.—The county filed a petition for a rehearing (Record, p. 154), which petition was on consideration denied by the United States Circuit Court of Appeals (Record, pp. 163, 164).

PETITION BY DEFENDANT TO THE UNITED STATES SUPREME COURT FOR CERTIORARI TO BRING THE SAID CASE TO THIS COURT.—Afterwards the defendant the Board of County Commissioners of Lake County filed in this court a petition for a writ of *certiorari* to bring to this

court for review the judgment of the United States Circuit Court of Appeals, which writ was granted, and the record has been accordingly returned (Record, pp. 166-169).

ARGUMENT.

I.

Before proceeding to the examination of the specific questions raised on the record, which show that the plaintiff is clearly entitled to judgment, we desire to call the attention of the court to certain facts which show that moral justice, and honest and fair dealing, equally entitle the plaintiff to such judgment.

The county of Lake incurred this indebtedness for the purpose of building a court house, which was emphatically a legitimate county purpose. The court house—a handsome, substantial and commodious building—was constructed, and has ever since been used, and is now being used by the county, and the county thus received full value for its bonds.

This is shown by the records of the county introduced in evidence by the defendants the county commissioners (Record, pp. 75-95), and by the testimony of Mr. PARKS, who says (Record, p. 33):

“ I was attorney of the county from about the 11th day of February, 1879, to the 15th day of April, 1880, when I resigned; I was reappointed the 23d day of April, 1883, and served until the 1st of January, 1890; and I had more or less to do with the county business, and knew Mr. Roberts personally, and had my

office close by and saw the court-house going up, and saw the work and know all about it."

Vote of the people of the County.—This indebtedness was incurred pursuant to a direct vote and authorization of the people of the county at the general election held October 7, 1879. See the record introduced in evidence by the defendants the county commissioners, Record, pp. 75-95.

Recital in the bonds.—Afterwards, and pursuant to such vote, and pursuant to the statute authority, the county issued the bonds in question, containing a recital as follows (Record, pp. 4, 26):

"This bond is one of a series of fifty thousand dollars, which the Board of County Commissioners of said county have issued for the purpose of erecting necessary public buildings, by virtue of and in compliance with a vote of the majority of the qualified voters of said county, at an election duly held on the 7th day of October, A. D. 1879, and under and by virtue of and *in compliance with an act of the General Assembly of the State of Colorado, entitled 'An act concerning Counties, County officers and County Government, and repealing laws on these subjects,' approved March 24th, A. D. 1877, and it is hereby certified that all the provisions of said act have been fully complied with by the proper officers in the issuing of this bond.*"

The statute referred to in the said recital, namely, the act approved March 24, 1877 (General Laws of Colorado, 1877, p. 223, sec. 21), contains the same limitation upon the indebtedness of the county as that provided in section 6 of article xi. of the State constitution (see said section 21, this brief, p. 52) as respects indebtedness of this kind voted upon by the people, namely:

"*Provided*, That the aggregate amount of indebtedness of any county, exclusive of debts contracted prior to July 1, 1876, in which the assessed valuation of

property shall exceed \$1,000,000 for all purposes, shall not be in excess of the following ratio, to wit: Counties in which the assessed valuation of property shall exceed \$5,000,000, \$6 on each \$1,000 thereof; counties in which the assessed valuation of property shall be less than \$5,000,000 and exceed \$1,000,000, \$12 on each \$1,000 thereof."

These bonds with these recitals were issued and sold for full value and the proceeds used in building the court house as above stated, and passed into the hands of Savings Banks and other holders, all but one or two of whom were non-residents of Colorado, and all said holders assigned the coupons in question to Mr. Dudley, the plaintiff in this case.

This is the record on which the county seeks to repudiate its bonds, and the county officers and their learned counsel are now here asking the sanction of this court to such repudiation. To the question whether, according to morality and justice, honesty and fair dealing, they ought to succeed, there can be but one answer. We proceed to show that, even according to the strictest rules of law as well as morality, the county has no defense.

It is not contended or objected against the validity of the bonds that they were not issued pursuant to the statute. The only objection urged is that the amount of the indebtedness, together with the other indebtedness of the county, exceeded the constitutional limitation.

II.

The plaintiff was a bona fide holder, or entitled to the rights of a bona fide holder, of the coupons in question.

These bonds were sold by the county at 95 cents on the dollar, and the proceeds were used in building the court house. See the county records introduced in evidence by the defendants the county commissioners, Record, pages 75-95. Most of these bonds were purchased from the county by L. E. ROBERTS, the contractor who built the court house. About \$11,000 of them were purchased by WALTER H. JONES (Record, pp. 80, 75-95). The said Roberts afterwards built the said court house (Testimony of DANIEL E. PARKS, Record, pp. 32, 33). The Circuit Court of Appeals says: "The County of Lake received full consideration for these bonds" (Record, p. 151). Roberts paid the county 95 cents on the dollar for the bonds (Record, p. 91). E. W. Rollins purchased for value of Roberts, the contractor (Record, p. 40; Wright's Ev., Rec., p. 19). On these facts the said Roberts and the said Jones were clearly *bona fide* purchasers of the said bonds.

That the person who first takes bonds from a municipal corporation under such circumstances, as well as any subsequent taker, may be a *bona fide* purchaser for value is well settled by the decisions of this court in *Commissioners vs. Bolles*, 94 U. S., 104, and *Montclair vs. Ramsdell*, 107 U. S., 147. In this latter case this court said, Mr. Justice HARLAN giving the opinion (p. 160):

"This question was directly adjudged in *Commissioners vs. Bolles*, 94 U. S., 104. One of the issues

there was whether the plaintiff was a *bona fide* holder of certain municipal bonds. After stating that the legal presumption was that they were, the court, speaking by Mr. Justice STRONG, said: 'But the plaintiffs are not forced to rest upon mere presumption to support their claim to be considered as having the rights of purchasers without notice of any defense. They can call to their aid the fact that their predecessors in ownership were such purchasers. To the rights of those predecessors they have succeeded. Certainly the railroad company paid for the bonds and coupons by paying an equal amount of their stock, which the county now holds; and nothing in the special facts found shows that the company knew of any irregularity or fraud in their issue.' The court proceeded: 'And still more, the contractor for building the railroad received the bonds from the county in payment for his work, either in whole or in part, after his work had been completed. There is no pretense that he had notice of anything that should have made him doubt their validity. Why was he not a *bona fide* purchaser for value? The law is undoubted that every person succeeding him in the ownership of the bonds is entitled to stand upon his rights.' "

Afterwards E. W. ROLLINS bought \$39,000 of these bonds, and paid for them 92½ cents on the dollar, and had no notice or knowledge of any illegality. He made this purchase from the contractor L. E. ROBERTS (Record, p. 40). Rollins afterwards sold these bonds to others for value. Rollins was thus a *bona fide* purchaser of said bonds (Record, p. 40), and thus these coupons came into the hands of the purchasers for value, who assigned the coupons now in question to Dudley. The law is well settled that under such circumstances the plaintiff Dudley is a *bona fide* holder for value, and entitled to all rights of a *bona fide* holder.

A *bona fide* holder is a purchaser for value without notice, or the successor of one who was such purchaser.

McClure vs. Oxford Township, 94 U. S., 429.

If any previous holder of the bonds in suit was a *bona fide* holder for value, the plaintiff can avail himself of such previous holder's position without showing that he has himself paid value.

Montclair vs. Ramsdell, 107 U. S., 147.

Though he may have notice of infirmities in its origin, a purchaser of a municipal bond from a *bona fide* holder before maturity takes it as free from such infirmities as it was in the hands of such holder.

Douglass County vs. Bolles, 94 U. S., 104.

Marion County vs. Clark, 94 U. S., 278.

Cromwell vs. Sac County, 96 U. S., 51.

San Antonio vs. Mehaffy, 96 U. S., 312.

City of Nauvoo vs. Ritter, 97 U. S., 389.

The foregoing is a complete answer to the argument of the counsel for the county to the effect that the plaintiff Dudley paid no value for the coupons. This fact is immaterial so far as concerns the question whether he is entitled to the rights of a *bona fide* holder for value. It is enough that his predecessors in title paid value, and that the coupons have been assigned to him by a valid assignment.

III.

The Circuit Court had jurisdiction of this action under the Federal statutes.

In his brief in support of the petition for writ of *certiorari* the counsel for the county undertook to question the title of the plaintiff Dudley to sue as a

bona fide holder of these coupons, on the ground that Dudley himself had paid no value; and that, on this ground, the action of the Circuit Court in directing a verdict for the defendant was right; and the judgment of the Circuit Court of Appeals was wrong. But, as we have seen, the fact that Dudley himself paid no value is immaterial, as it was proved on the trial that his predecessors in title paid value, and that qualified him to sue as a *bona fide* holder of these coupons.

The fact that one or two of the purchasers of these bonds and the assignors to the plaintiff of these coupons was a resident of Colorado does not make him any the less a *bona fide* holder of such coupons. Inasmuch as these coupons were commercial paper, Dudley, as the assignee of these, could sue thereon, although his assignors could not, these being within the express exception of the statute which restricts assignees of choses in action generally from suing in the Federal courts unless their assignors could sue therein. But even if the fact were otherwise as to the coupons assigned by the residents of Colorado, yet as to the coupons assigned by the savings banks and others, non-residents of Colorado, the plaintiff would clearly have a right to sue because his assignors would have had a right.

We are aware of the decisions of this court, to which counsel for the county calls attention, under the act of Congress of March 3, 1875, which provides that:

“If it shall appear to the satisfaction of the Circuit Court at any time after suit has been brought that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either

as complainants or defendants, for the purpose of creating a case cognizable under the act, the Circuit Court shall proceed no further therein, but shall dismiss the suit."

The first and most obvious answer to this proposition of the learned counsel for the county as to the provisions of the said act of March 3, 1875, and the decisions thereunder, is that **no such question arises on the record in the present case.** The Circuit Court did not make any ruling on this point. It did not take any testimony or grant any hearing on the question whether the suit was improperly or collusively made; nor did it attempt to dismiss the suit for any such reason; nor was it asked to dismiss the suit for such reason—namely, for the want of jurisdiction. Therefore, no question of this kind entered into the case before the Circuit Court of Appeals, nor is it in the case in this court. On the contrary, the Circuit Court entertained jurisdiction, heard the case on the merits and directed a verdict in favor of the defendant. Even if it were conceded that the suit was improperly or collusively made, then the remedy would be, not to have a judgment on the merits as an adjudication and an estoppel in favor of the defendants, but to dismiss the suit altogether for want of jurisdiction. If this be so, then the judgment of the Circuit Court was wrong and should be reversed. In this event, a suit on these coupons could still be maintained in the Federal court. Mr. Dudley could bring this suit in the name of his assignors, the New Hampshire savings banks and the residents of Connecticut; but, under the Federal statutes, it is per-

fectly clear that he need not do this, but he can sue in his own name.

The learned counsel for the county is evidently confusing two distinct things: One, the rights on general principles of law of a *bona fide* holder of negotiable paper to sue as a *bona fide* holder by reason of the fact that a predecessor in title paid value. That is one thing; and, as we have shown above, there is no doubt of the rights of Dudley as the holder of these coupons to sue as a *bona fide* holder on the facts proved and under the authorities above quoted. Another question is whether under the act of March 3, 1875, the parties have attempted to make a case in the Federal courts of which the Federal courts have no jurisdiction. In the present case there was not a particle of evidence of any such thing. On the contrary, there was ample evidence in the record to show that the plaintiff is a resident of the State of New Hampshire; that he had received assignments of the coupons in question from certain savings banks in the State of New Hampshire and certain residents of the State of Connecticut, and these coupons were many times sufficient in amount to establish and maintain the jurisdiction of the Federal courts on the ground of diverse citizenship of the parties to the suit. The facts as to the non-residence of these assignors was not in the least disputed, nor was any attempt made to dispute them. The mere fact that there were also brought into the suit a few coupons held by two residents of the State of Colorado does not in any manner show that there was any attempt to impose upon the jurisdiction of the Federal courts. The Federal court had jurisdiction without these Colorado coupons being brought in. Therefore, the fact which the learned counsel for the county seeks to main-

tain—namely, that this suit was an attempt to bring into the Federal courts a suit of which the Federal court does not properly have cognizance—wholly fails. There is no ground on which the learned counsel for the county can base such a proposition. The counsel for the county, therefore, fails to defeat either of these propositions; namely: (1) The proposition that the plaintiff is a *bona fide* holder for value according to the general principles of law; and (2) the proposition that the plaintiff is entitled to bring this suit in the Federal court.

As to the coupons which were assigned to the plaintiff by the residents of Colorado, the plaintiff is clearly entitled to sue on these as well as on the others involved in the action, for the reason (1) that he is, on general principles of law, a *bona fide* holder of the said coupons, his predecessors in title having been *bona fide* holders of the same; and (2) for the reason that the statute which generally restricts the right of assignees to sue in the Federal courts especially excepts the case of negotiable paper. Even if it were the fact that such exception would not apply in the case of a collusive transfer merely for the sake of making a case in the Federal court, yet the record and the evidence in the present case wholly negative any suggestion of the counsel for the county that the plaintiff has attempted to make any such collusive case.

IV.

Inasmuch as the bonds contain the recital that they are issued "under and by virtue of and in compliance with an act of the General Assembly of the State of Colorado, entitled 'An act concerning counties, county officers and county government, and repealing laws on these subjects,' approved March 24, A. D. 1877, and it is hereby certified that all the provisions of said act have been fully complied with by the proper officers in the issuing of this bond," and inasmuch as Section 21 of the said Act of March 24, 1877, which authorizes the issue of these bonds, contains the same limitation on debt voted by the people of the county as is contained in Section 6 of Article XI. of the State Constitution, such recital in the bonds is conclusive in favor of the bona fide holder that the debt limit prescribed by the statute and by the constitution has not been exceeded.

The statute under which these bonds are issued—namely, the act of March 24, 1877—expressly provides, among other things, as follows:

"Provided, That the aggregate amount of indebtedness of any county, exclusive of debts contracted prior to July 1, 1876, in which the assessed valuation of property shall exceed one million of dollars, for all purposes, shall not be in excess of the following ratio, to wit: Counties in which the assessed valuation of property shall exceed five million of dollars, \$6 on each thousand dollars thereof; counties in which the assessed valuation of property shall be less than five

millions, and exceed one million of dollars, \$12 on each thousand dollars thereof."

Section 22 of the said act expressly provides, among other things, as follows :

"The county commissioners, when authorized as provided in section 21 of this act, shall make and issue coupon bonds of the county *not exceeding the amount specified in the preceding section* in counties which shall have an assessed property valuation exceeding one million of dollars."

Section 6 of Article XI. of the Colorado State Constitution, as it stood prior to the amendment of 1888, was as follows (General Statutes, Colorado, 1883, p. 62) :

"No county shall contract any debt by loan, in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges, and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county following, to wit : Counties in which the assessed valuation of taxable property shall exceed \$5,000,000, \$1.50 on each thousand thereof ; counties in which such valuation shall be less than \$5,000,000, \$3 on each thousand dollars thereof. And the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this Constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt ; but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned : *Provided, That this section shall not apply to counties having a valuation of less than \$1,000,000.*"

The holder of these bonds, examining them on their face, and examining the assessment rolls of the county for the last assessment prior to the time when the bonds were issued, could not have ascertained that there was an over-issue. The bond recites that it is one of a series of \$50,000.

The assessed valuation of taxable property in said County of Lake for the year 1879 was \$3,485,628, and for the year 1880 (which is the valuation applicable to these bonds which were issued after September 6, 1880) was \$11,124,489, and such assessment was completed on the first day of September in each of said years by the action of the Board of Equalization (Record, p. 47).

Six dollars on the \$1,000 on the valuation of 1880 would be \$66,746.93. Therefore, the \$50,000 issue recited in the bonds would be within the limit prescribed both by the statute and by the constitution.

The bonds in question were not issued until after September 6, 1880, and could not have been before that time, for that is the date of the meeting of the county commissioners at which the bonds were ordered to be issued (Record, p. 91). The bonds were, of course, not bonds at all until delivered. Under the ordinary principles of commercial law the bonds did not constitute an indebtedness until they were delivered, which was after September 6, 1880.

The fact that the vote of the people was had October 7, 1879, and that on the assessment for 1879, \$3,485,628 (Record, p. 47), the \$50,000 would have made a debt in excess of the limit prescribed by the statute and by the constitution is immaterial so long as the amount of the bonds actually issued and the debt actually incurred by their issue did not exceed the \$6

on the \$1,000 of the assessed valuation, as the assessed valuation existed at the time the bonds were delivered and the indebtedness actually incurred thereby.

This proposition has been decided by this court in the case of *Marcy vs. Township of Oswego*, 92 U. S., 97. It was held in that case in the Circuit Court by Mr. Justice MILLER that because the township had voted to issue more bonds than it lawfully could under the statute the whole series thus voted are void; but the Supreme Court of the United States reversed this ruling, and held the bonds valid, at least in the hands of *bona fide* holders. A similar case arose in the Supreme Court of Kansas and was decided in *Turner vs. Commissioners of Woodson County*, 27 Kans., 314 (1882). The portion of the act there in question was a part of the first proviso to Section 1, to wit: "No township shall be allowed to issue more than \$15,000 and five per cent. additional of the assessed value of the property of such township." The action was to restrain the issue of \$27,000 of bonds of Center Township in Woodson County to the St. Louis, Fort Scott and Wichita Railroad Company. The facts in the case are stated by Mr. Justice BREWER as follows:

"Upon a proper petition, the county commissioners ordered an election in said township on the question of subscribing to the stock of said railroad in the sum of \$27,000, and paying therefor in township bonds. The vote was duly had, and a majority voted in favor of the subscription. All the proceedings were legal and regular, except as hereinafter stated. At the time of the vote the last completed assessment of the taxable property of said township was \$215,602. This was the assessment for the year 1880. Before the commencement of this action, and before the railroad company had acquired any right to any bonds under the vote by the completion of their railroad through the township, and before any attempt on the part of the com-

missioners to issue the bonds, the assessment for 1881 had been completed, and amounted to \$227,711. Under the limitations of the statute, the \$27,000 voted exceeded the amount which the township might lawfully issue upon the basis of the assessment of 1880 by the sum of \$614.45. Upon the basis of the assessment of 1881, the whole \$27,000 might lawfully issue. The district court held that the assessment of 1880 controlled and enjoined the issue of \$614.45 of these bonds, and refused to enjoin the issue of the remainder, \$26,385.55. The railroad company and the county commissioners took no exception to the ruling of the district court, but the plaintiff excepted to the refusal to enjoin the issue of the \$26,385.55 and brings the case here for review."

Proceeding to give the opinion of the Court, Mr. Justice BREWER says (p. 316) :

" Three propositions are made by counsel for plaintiff : First, it is insisted that the assessment of 1880 controlled, and that, as under it the township had voted to issue more bonds than it legally could, the vote was a nullity, and no power vested in the commissioners to issue any bonds ; second, * * * Of these in their order : Assuming that the assessment of 1880 controlled, was the vote authorizing the issue of \$27,000 a nullity ? We think not. The prohibition in the statute is on the *issue* of the bonds. Its language is : ' No township shall be allowed to issue more than,' etc., so that whatever amount the township may be willing to vote, and whatever amount they may by their vote authorize the commissioners to issue, the statute steps in and prescribes a limit beyond which the commissioners may not go. Reference is made to the case of *Marcy v. The Township of Oswego*, 92 U. S., 637, decided in the first instance in the circuit court by Mr. Justice MILLER, and to the case of *Hurt v. Hamilton*, 25 Kas., 76, in which an opinion is expressed antagonistic to the views of the supreme court of the United States in the case just cited. In the former case Mr. Justice MILLER held that, because the township had voted to issue more bonds than it lawfully could under the statute, the whole series thus voted was void. The Supreme Court of the United States reversed this ruling, and held them all valid, at least in

the hands of *bona fide* holders. But a marked distinction exists between the statute under which the bonds were voted in this case and that under which the bonds in the Oswego case were voted. That statute provided (Laws 1870, ch. 90, sec. 1) 'that the amount of bonds *voted* by any township shall not be above such an amount,' etc. This, as heretofore stated, is: 'No township shall be allowed to *issue* more than,' etc. But even in that case, notwithstanding the amount authorized by the vote was excessive, yet if in fact the authorities had only issued the amount the township might legally issue, it may well be doubted whether in the circuit court the bonds would not have been held valid by Mr. Justice MILLER, and of course there would be no question as to the decision in the supreme court of the United States; but here the limitation is upon the issue, not upon the vote. However excessive the authority apparently granted by the vote to the commissioners, that authority is good up to the statutory limit. The vote of the township was simply an authorization by a principal to its agent, and the agent may perform the act authorized, except so far as it is restrained by some provision of law. Generally speaking, a grant of excessive authority is good up to the legal limit, and an authorization to do more than can legally be done is void only as to the excess. Hence we conclude that the first and principal objection to the ruling of the district court cannot be sustained."

When, therefore, a purchaser of the bonds in question in the present case examined the debt limit provision of the constitution and of the statute authorizing the bonds, and the assessment roll, and examined the face of the bonds themselves, each one reciting that this bond is one of a series of \$50,000, he could not thereby ascertain that the issue of the bonds was in excess of the limit prescribed by the constitution.

On the contrary, the purchaser of these bonds would be solemnly informed and assured by the recitals therein that they are issued "under and by virtue of and in compliance with the act of the General Assem-

bly of the State of Colorado, entitled 'An act concerning counties, county officers and county governments, and repealing laws on these subjects,' approved March 24, A. D. 1877, and it is hereby certified that all the provisions of said act have been fully complied with by the proper officers in the issuing of this bond"—that is to say, that the debt limit prescribed by the statute, which is precisely the same as that prescribed by the Constitution, has not been exceeded. The debt limit prescribed by the Constitution being specifically repeated in sections 21 and 22 of the act of March 24, 1877, recited in the bond as the authority for its issue, and the bond reciting and stating for the assurance of the purchaser that it is issued "under and by virtue of and *in compliance with*" said act, and "that all of the provisions of said act have been fully complied with," and furthermore reciting a vote of the people specifically authorizing this very issue of bonds, it is manifest that these recitals mean to assure the purchaser, among other things, that the debt limit of the Constitution, a fact peculiarly within the knowledge of the County, has not been exceeded, and they are false if the contrary is the fact.

The position above taken was held in this case by the United States Circuit Court of Appeals. The Court says (Record, p. 148):

"Such purchaser was therefore entitled to rely on the recitals in the bonds. And, as one of these recitals was a certificate that all the provisions of the act had been fully complied with by the proper officers in the issuing of the bonds, and as a provision of that act limiting the issue of the bonds by the aggregate of all the indebtedness of the county was in effect identical with the constitutional provision on the same subject, the recital was equivalent to a certificate that this provision of the constitution had been complied with, and

brings the case within the decision in *Chaffee County vs. Potter, supra*."

The same principle is decided by this court in *School District vs. Stone*, 106 U. S., 183, where this Court said :

"Had the bonds recited that they were issued by authority of the election of July 31, 1869, and in *conformity with the provisions of* the statute referred to, there would, in view of the decisions of this Court, be more force in the argument in behalf of the defendant in error. * * * And we should, then, be obliged to decide whether, in view of the constitutional provision, a false recital by the School Board as to the value of the taxable property would conclude the district as between it and a *bona fide* purchaser for value; for, in such case, **since the statute itself contains, substantially, the same limitation upon indebtedness by independent school districts as is prescribed by the State Constitution for county or other political or municipal corporations, a distinct recital that the bonds were issued in conformity with the statute would fairly import a compliance with the Constitution.**"

In *Buchanan vs. Litchfield*, 102 U. S., 278, the bonds there in question recited : "This bond is issued under authority of an act * * * and in pursuance of an ordinance." This court said, Mr. Justice HARLAN giving the opinion (p. 292) :

"Had the bonds made the additional recital that they were issued in accordance with the constitution, or had the ordinance stated in any form that the proposed indebtedness was within the constitutional limit, or **had the statute restricted the exercise of the authority therein conferred to those municipal corporations whose indebtedness did not, at the time, exceed the constitutional limit, there would have been ground for holding that the city could not, as against the plaintiff, dispute the fair inference to be drawn from such recital or**

statement as to the extent of its existing indebtedness."

In *Commissioners, etc., vs. Bolles*, 94 U. S., 104, the Court said :

"The recitals we have now before us are that the bonds were executed and issued not only by virtue of, *but in accordance with* the acts of the Legislature and in pursuance of and in accordance with the vote of a majority of the qualified electors of the county. They are untrue if the Board had not followed the *directions of the law.*"

In *Marcy vs. Township of Oswego*, 92 U. S., 637, the Court said :

"It is to be observed that every prerequisite fact to the execution and issue of the bonds was of a nature that required examination and decision. The *existence of sufficient taxable property to warrant the amount of the subscription* and issue was no more essential to the exercise of the authority conferred upon the Board of County Commissioners than was the petition for the election, or the fact that fifty freeholders had signed, or that three-fifths of the legal voters had voted for the subscription." The Court further said : "*The order for the election, then, involved a determination by the appointed authority that the petition for it was sufficiently signed by fifty freeholders who were voters ; that the petition was such a one as was contemplated by the law, and that the amount proposed by it to be subscribed was not beyond the limit fixed by the Legislature.* So, also, the subsequent issue of the bonds containing the recital above quoted, that they were issued by virtue of and in compliance with the legislative act and in pursuance of and in accordance with the vote of three-fifths of the legal voters of the township, *was another determination, not only of the result of the popular vote, but that all the facts existed which the statute required in order to justify the issue of the bonds.*"

The recitals in the present Lake County bonds are exactly like the ones in *Marcy vs. Oswego, supra*.

There are many other decisions of the Supreme Court in principle the same, among which may be mentioned *Knox County vs. Aspinwall*, 21 How., 539; *St. Joseph Township vs. Rogers*, 16 Wall, 644; *Town of Coloma vs. Eaves*, 92 U. S., 484; *Converse vs. City of Fort Scott*, 92 U. S., 503; *Town of Concord vs. Portsmouth Savings Bank*, 92 U. S., 625; *County of Moultrie vs. Rockingham, etc.*, 92 U. S., 631; *Humboldt Township vs. Long*, 92 U. S., 642; *Wilson vs. Salamanca*, 99 U. S., 499; *Orleans vs. Pratt*, 99 U. S., 677; *Lyons vs. Munson*, 99 U. S., 684; *Insurance Co. vs. Bruce*, 105 U. S., 328; *Montclair vs. Randell*, 107 U. S., 147; *Sherman County vs. Simmons*, 109 U. S., 735; *Bernard Township vs. Stebbins*, 109 U. S., 341; *Northern Bank vs. Porter Township*, 110 U. S., 608; *Dallas County vs. McKensie*, 110 U. S., 686; *Carroll County vs. Smith*, 111 U. S., 556; *Dixon County vs. Field*, 111 U. S., 83; *New Providence vs. Halsey*, 117 U. S., 336; *Oregon vs. Jennings*, 119 U. S., 74; *German Bank vs. Franklin County*, 128 U. S., 526; *Lake County vs. Graham*, 130 U. S., 675; *Bernard Township vs. Morrison*, 133 U. S., 523; *Chaffee County vs. Potter*, 142 U. S., 355; *Nesbit vs. Riverside Independent District*, 144 U. S., 610; *Sutliff vs. Lake County*, 147 U. S., 230; *Cairo vs. Zane*, 149 U. S., 122; *Hedges vs. Dixon County*, 150 U. S., 182; *Citizens' Savings and Loan Association vs. Perry County*, 156 U. S., 692; *Evansville vs. Dennett*, 161 U. S., 434; *Pana vs. Bowler*, 107 U. S., 529.

If these bonds were issued in full compliance with the act referred to therein (sections 20-25 of which act were printed on the back of each bond), then their issue could not exceed the limitation of county indebtedness prescribed by that act. If their issue did cre-

ate an excessive indebtedness, then the act was violated and the recital was false. There is no possible way to reconcile the recitals in these bonds with the fact of an indebtedness in excess of the limitation of the statute under which they were issued. It is equally clear that the county will not be heard to dispute these recitals as against a *bona fide* holder.

The principle contended for by the County in this case impairs the marketability and value of the bonds and would work great injury to municipalities. The next case cited presents this view with great force.

In *Town of Coloma vs. Eaves*, 92 U. S., 484, the Court said :

"These bonds were intended for sale ; and it was rationally to be expected that they would be put upon distant markets. It must have been considered that the higher the price obtained for them, the more advantageous would it be for the company and for the cities and towns which gave the bonds in exchange for capital stock. Everything that tended to depress the market value was adverse to the object the Legislature had in view. It could not have been overlooked that their market value would be disastrously affected if the distant purchasers were under obligation to inquire before their purchase, or whenever they demanded payment of principal or interest, whether certain contingencies of fact had happened before the bonds were issued—contingencies the happening of which it would be almost impossible for them in many cases to ascertain with certainty. Imposing such an obligation upon the purchasers would tend to defeat the primary purpose the Legislature had in view—namely, aid in the construction of the road. Such an interpretation ought not to be given to the statute, if it can reasonably be avoided ; and we think it may be avoided."

The point that the statute-debt limitation and the constitutional debt limitation are coincident, and that the recital in the bond that it is issued "in full compliance with" the act, &c., was effective as an estoppel

on the county to show that it had a debt in excess of the limit prescribed in the statute, was not made or decided in the case of *Sutliff vs. Lake Co. Commissioners*, 147 U. S., 230, nor was any such point discussed in the opinion, nor were the authorities which we cite below on the point referred to. For these reasons, therefore, the case of *Sutliff vs. Lake Co. Commissioners* is not a precedent to govern the case at bar.

This recital, therefore, in these bonds, that the bonds are issued "*in compliance with an act,*" and that "*all the provisions of said act have been fully complied with,*" is, therefore, in view of the fact that the statute prescribes precisely the same debt limit as the constitution in the case of the issue of bonds by vote of the people, to be given precisely the same effect as are the recital in the bonds in the case of *Chaffee County vs. Potter*, 142 U. S., 355, "That the total amount of this issue does not exceed the limit prescribed by the constitution of the State of Colorado," which recital in that case was held good and conclusive in favor of the *bona fide* holder.

V.

In the brief in the case of the Board of County Commissioners of the County of Gunnison vs. E. H. Rollins & Sons, No. 178, which case is set for argument at the same time as the present case, we have stated and shown at length (Brief in the Gunnison case,

pp. 38-50) **that the county officers have power to make such recitals as respects a constitutional debt limitation as well as respects the statutory debt limitation. On this point we respectfully refer the court to the arguments in the said brief at the pages above mentioned.**

VI.

The Circuit Court of Appeals properly held that the bonds in controversy did not create a debt by loan in any one year greater than that allowed by the constitution of Colorado.

The negative of this proposition is maintained by the learned counsel for the county, and constitutes the second point in his brief (pp. 35-39), where the constitutional provision is quoted. This objection to the bonds, although not raised by the answer, is fully considered and discussed by the Circuit Court of Appeals in the third division of its opinion (Record, pp. 149-151). It is on this point alone that Judge THAYER dissents, apparently agreeing with the court in every other respect. We find on reading the brief of the learned counsel on the other side in this court on this subject that the argument made in behalf of the county on this point has been so fully answered, and to our minds so satisfactorily anticipated and met by the opinion of the Circuit Court of Appeals, delivered by

Judge LOCHREN and concurred in by Judge SANBORN, that we here reproduce it at length.

" 3. A question not suggested by the answer in the case remains to be considered. The first part of Sec. 6, of Article XI., of the Constitution of Colorado, above quoted, as applicable to the class of counties having an assessed valuation of taxable property exceeding five millions of dollars, in the absence of any vote of the qualified electors, restricts the amount of debt by loan which the county can be allowed to contract in any one year, to \$1.50 on each thousand of such assessed valuation. It is questioned whether this limitation upon the amount of debt by loan which the county may be allowed to contract in any one year, does not continue, even after authority has been given by vote of the qualified electors, to create an aggregate indebtedness to the extent, it may be, of six dollars on each thousand of such assessed valuation.

" The contention that the restriction referred to, respecting the amount of debt by loan which a county may be allowed to contract in any one year, without such vote, continues after the changed condition effected by such vote, appears to rest upon what seems to us to be a misconception of a sentence in the opinion in *Lake County vs. Rollins*, 130 U. S., 662, 669. Under the stipulation in that case (p. 664), the only question in the case was whether the limitations contained in Sec. 6 of Article XI. aforesaid were restrictive only of the power of counties to create debts by loan, or restricted further the power to create and incur all forms of indebtedness; it being admitted by the stipulation, that if the general limitations expressed in that section covered all forms of indebtedness, and were not confined to debts by loan exclusively, the defendant in that action was entitled to judgment. Mr. Justice LAMAR pointed out that the first clause of the section, down to where the subject of aggregate indebtedness is considered, speaks only of debts by loan. He then added "Here the matter of indebtedness by loan is completed, and the section passes to a broader subject." In view of the exact question then under consideration, this language means that at the point of the section indicated, the matter of debt by loan exclusively, is completed, and that thenceforward the section passes to a broader subject, embracing all other forms of indebtedness as well as debt by loan. It is

obvious that every sentence of the entire section may enlarge, limit or in some way qualify, the power to contract debts by loan. The provision in respect to submitting the question of incurring indebtedness to the qualified electors, contemplates the submitting of specific propositions, and if the vote is in favor of incurring the debt, the provision that if bonds are issued they shall run not less than ten years, necessarily provides that such debt when so authorized, may be created by loan.

"The case of *The People vs. May*, 9 Colo., 80, does not touch the question of how much indebtedness by loan may be contracted by a county in any one year, after authority has been given by a majority vote of the qualified electors to contract the indebtedness. In that case, as in the Rollins case, the sole question considered arose upon the contention that the Constitutional restriction contained in said Section 6, as to the aggregate amount of county indebtedness, should be regarded only as a limitation of county indebtedness by loan. The Court held, as in the Rollins case, that the general limitations as to aggregate indebtedness, embraced all forms of county indebtedness.

"The provisions of Sec. 6 aforesaid divide themselves into two general clauses, distinct from each other, and each applicable to a condition differing from that to which the other is applicable. The first clause, extending down to the preposition 'unless,' prescribes the restrictions and limitations in respect to the power of contracting indebtedness by counties where there has been no vote of the qualified electors authorizing the creation of specific indebtedness, and not only limits the aggregate amount of indebtedness that can be incurred for all purposes, and in all forms, but also limits the amount of indebtedness by loan that can be created in any one year. The second clause following the preposition 'unless' provides for a changed and different condition, in which a county, by vote of a majority of its qualified electors, upon a proposition submitted to them at a general election, has been authorized to create a specific indebtedness. In that case a single and different limitation is prescribed, namely, that that aggregate debt of the county shall not be made to exceed twice the amount limited in the other case, and a provision (contemplating debt by loan) that the bonds, if any be issued therefor, shall not run less than ten years. But there is no limi-

tation in such case, as to the amount of the indebtedness so authorized which can be created in any one year. It would be singular, indeed, if after authorizing a county, upon vote of its qualified electors, to create a specific indebtedness, for the erection of necessary public buildings, the same provision should cripple the power to erect such buildings, by requiring that the long-time bonds authorized, should only issue and be sold in small annual installments ; making the county wait, perhaps a series of years, before getting enough money to warrant it in beginning the erection of the necessary public buildings, and be paying in the meantime interest on the earlier bonds, the proceeds of which would be lying idle, awaiting the accumulation of enough to begin with. Neither the grammatical construction of the section nor any sound reason justifies the importation into the last clause of the section, of the restriction in the first clause as to the amount of debt by loan which can be created in any one year. It may be added, that the legislative construction of this section of the Constitution, as shown by Sec. 21 of the act of March 24, 1877, under which these bonds were issued, conforms to the views here expressed, and that the Supreme Court, in *Sutliff vs. Lake County*, 147 U. S., 230, 234, refers to this statute as being, in respect to limitations, in conformity with the Constitution."

The reason why the views of the learned counsel for the county that the limitation of debts by loan in the first part of section 6, Article XI., of the constitution, cannot be enlarged by the vote provided for in the latter part of the section is shown to be unreasonable and unsound by the following considerations :

1. The fundamental proposition on the other side is that the amount specified in the first part of section 6 cannot be enlarged by a vote, whereas the true and only purpose of the provisions for a vote was that if a favorable vote was had an enlarged amount could be issued. That is the function of the vote. The learned counsel for the county is in the untenable position of suggesting : "Yes ; you can create a debt to the extent

of a mill and a half without a vote, but you cannot create a debt for this purpose in any greater amount with a vote." That is the proposition on the other side. That nullifies, emasculates and sets at naught the provisions of the constitution providing for a vote. Why have a vote if you can do everything without the vote that you can do with it?

2. The constitution expressly provides for the issue of bonds for the larger amount whenever a vote is had. The language of Section 6 of Article XI. of the constitution in this respect is as follows :

" And the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this Constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt ; but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned : Provided, That this section shall not apply to counties having a valuation of less than \$1,000,000."

Note the language : " And a majority of voters voting thereon shall vote in favor of incurring **the debt**, but the **bonds**, if any be issued **therefor**," &c. This language clearly means that bonds may be issued for "**the debt**" so voted, and for **all** "**the debt**" so voted, subject to the limit which is then expressly provided : " But the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of "**debt so contracted**" [that is, contracted by virtue of the vote authorizing the issue of

the bonds] shall not exceed twice the rate upon the valuation last herein mentioned." This is a specific provision that where such vote is had "**bonds**" may be issued "**therefor**," provided the aggregate amount of the debt shall not exceed at any time six dollars on the thousand. It is inconsistent with the proposition of the counsel for the county that bonds can be issued for only \$1.50 in the thousand (which may be done without a vote) ; for, if this proposition is true, the power to issue bonds is not determined by the vote of the people within the limit proposed—namely, twice the rate—and nullifies the language of the constitution that bonds may be issued for the amount voted, provided that amount be within the limit of twice the rate expressed in the same sentence of the constitution. These considerations are so well presented and elaborated in the opinion of Judge LOCHREN that we need not say anything more on this point.

3. The contention of the learned counsel for the county also nullifies the language of the constitution which says : " And the aggregate amount of indebtedness of any county for *all* purposes," &c. The counsel for the county would make these words read : " And the aggregate amount of indebtedness of any county for all purposes, *except for public buildings, roads and bridges ;* " whereas, the view which was taken by the Circuit Court of Appeals, and which we here maintain, is that the last half of section 6 of Article XI. of the constitution applies as well in the case of incurring indebtedness for public buildings, roads and bridges as in the case of incurring indebtedness for any and all other purposes. The language of the constitution is : " For *all* purposes," and it means what it says, and it is utterly inadmissible to

insert by judicial construction into this language, "All purposes, *except those for public buildings, roads and bridges.*" This court decided in the case of *Lake County vs. Rollins*, 130 U. S., 662, and in the case of *Lake County vs. Graham*, 130 U. S., 674, that the words "all purposes" could not be cut down so as to exclude indebtedness for ordinary county expenses. For the same reason we say that they cannot be cut down so as to exclude indebtedness for public buildings, roads and bridges represented by "bonds" issued "therefor." The learned counsel for the county is mistaken in maintaining in his brief (p. 25) that the case of *Lake County vs. Graham*, 130 U. S., 674, supports his contention. On the contrary, as just stated, it defeats that contention.

The question in the *Lake County case* was the single question whether the constitutional limit embraced debts created by a county for ordinary county purposes in the usual course of administration as well as debts created by loan. This was the single question which was argued and discussed in that case; for it was stipulated that, if it did so embrace such county indebtedness, the county indebtedness was, as a matter of fact, beyond the limit. Mr. Justice LAMAR's language must of course be construed with reference to this point with which he was dealing. Therefore, when he says, "Here the matter of indebtedness by loan is completed, and the section passes to a broader subject," he means just what he says—that here the matter of indebtedness by loan, *exclusively and without a vote of the people*, is completed, and the section passes to a broader subject, dealing with the subject of county indebtedness for "*all purposes*," and providing that on a vote of the people the limits may be enlarged to the

extent specified in the section. His language did not deal or attempt to deal with, or in any way refer to, the question of what indebtedness might be created by a vote of the people.

4. As well pointed out by the Court of Appeals (Record, p. 150), this was the construction adopted by the legislature of the State of Colorado immediately after the adoption of the constitution of the state, when, March 24, 1877, the legislature passed the act authorizing the issue of the bonds in question. In section 21 of that act the proviso is as follows :

“ Provided, that the aggregate amount of indebtedness of any country exclusive of debts contracted prior to July first, 1876, in which the assessed valuation of property shall exceed one million of dollars, for all purposes, shall not be in excess of the following ratio, to wit : Counties in which the assessed valuation of property shall exceed five million of dollars, \$6 on each thousand dollars thereof ; counties in which the assessed valuation of property shall be less than five millions, and exceed one million of dollars, \$12 on each thousand dollars thereof.”

This statute, in the view here stated, contains precisely the same limitation upon the indebtedness as that provided in Section 6 of Article XI. of the State constitution as respects the incurring of indebtedness for public buildings when voted upon by the people. This legislative enactment, passed immediately after the adoption of the constitution, and with full knowledge of the purpose of the constitutional provision, would have great weight if the meaning of the constitution were otherwise obscure or ambiguous, which it is not. In the view which we here present, this proviso of section 21 of the act of March 24, 1877, is constitutional and valid ; whereas, in the view adopted by the learned counsel for the county, the proviso is un-

constitutional and invalid. This matter was, in the opinion of this court, in the case of *Sutliff vs. Lake County*, 147 U. S., 230, 234, where Mr. Justice GRAY refers to this very statute as being in respect of limitations in exact conformity with the constitution.

The learned counsel for the county clings with great tenacity to his proposition as to debt by loan, and seeks on this ground to bring this case within the decisions of this Court in *Dixon County vs. Field*, 111 U. S., 88, 90, and *Hedges vs. Dixon County*, 150 U. S., 182, on which he relies, to wit: He says that the bondholder must at his peril take notice of the assessed valuation for the year in which these bonds were issued, which was \$11,124,489. At six mills on the dollar this would allow, as above shown, an indebtedness, "exclusive of debts contracted before the adoption of the constitution," of \$66,746.93. The assessed valuation on September 1, 1880, was \$11,124,489. The bonds were not issued until after September 6, 1880 (Record, p. 91). The counsel claims that, notwithstanding the vote, no bonds could be issued in any one year in excess of \$1.50 in the thousand, which would be \$16,686.72. Then he says: "Lay the bond which recites an issue of \$50,000 beside the assessed valuation, and it shows on its face that the \$50,000 is in excess of the constitutional limitation; and therefore the bondholder had notice by the bond itself that it was void." We have, however, shown clearly that on this valuation it was allowable by a vote of the people to create a debt of six dollars on the thousand, which is \$66,746.93; so that, if you lay the bond reciting an issue of \$50,000 alongside the statement of indebtedness which the constitution on the vote of the people allows to be contracted, it is more than \$16,000 within the limit, to say nothing about debts "contracted be-

fore the adoption of the constitution," cash in the treasury, or other items which may be deducted or allowed.

Let us consider for a moment the practical effect of the construction which the counsel for the county here seeks to maintain. One view of this was stated by the Circuit Court of Appeals in its opinion above quoted (Record, p. 150), where the court says :

" It would be singular indeed if, after authorizing a county, upon vote of its qualified electors, to create a specific indebtedness for the erection of necessary public buildings, the same provision should cripple the power to erect such buildings, by requiring that the long-time bonds authorized should only issue and be sold in small annual installments ; making the county wait, perhaps a series of years, before getting enough money to warrant it in beginning the erection of the necessary public buildings, and be paying in the mean time interest on the earlier bonds, the proceeds of which would be lying idle, awaiting the accumulation of enough to begin with."

But this is not the only objection to this view. The county might indeed commence the erection of the public building on the dribble of \$16,000 for the first year, and spend that amount of money in constructing a foundation and what is necessary to cover it and protect it from the weather, and spend the next dribble the next year, and so on ; but what reason exists for any such forced and unnatural construction ? According to the view of the counsel for the county, it was right to vote the \$50,000 ; but he maintains that you could only issue a given proportion of this in any one year. If this is not his contention, then he must mean that you must have at least three votes, supposing the valuation is not changed, in order to obtain the requisite amount ; and it might chance that, after the first had been spent in constructing the foundation, the

county would be up to the limit by reason of incurring other indebtedness, and so defeat the entire project of obtaining county buildings, or leaving the buildings unfinished and ruinous.

VII.

The semi-annual statements required and provided for by section 30 of the act of March 24, 1877, were never in point of fact recorded in a book kept for that purpose. This stands admitted in the record (p. 64), and the ruling of the trial court in admitting, either as a substitute therefor, "the county clerk's account book" (Record, p. 64), or as evidence of which all the world was bound to take notice, was erroneous, and the plaintiff's exception thereto was well taken, and for this reason alone, if there were no other, the judgment of the trial court was rightly reversed by the Circuit Court of Appeals.

The express requirement of the said section 30 of the act of March 24, 1877, is, *inter alia*, that the financial statement therein provided for, "In addition to being published as before specified, shall also be entered of record by the clerk of the board of county commissioners *in a book to be kept by him for that purpose only*, which book shall be kept open to the inspection of the public at all times." The plaintiff objected on the trial to the reception of the so-called

financial statements, on the distinct grounds that the statement offered was neither made, nor proved, nor published by the board as section 30 requires. These objections are still relied on ; but we are now discussing the proposition on which the case turned in the Circuit Court of Appeals, namely, that there was no record of these financial statements made (admitting that they were otherwise sufficient) recorded in a book kept for that purpose only. It was admitted in the trial court by the counsel for the county (Record, p. 64) :

“ Mr. Bryant : The object is to show that what is known as the record of semi-annual statement book never commenced until some years after this, and that this is the only book which the county kept at that time.”

MR. NEWELL, the county clerk of Lake county, produced by the defendant, testified that the book offered in evidence is “ the county clerk’s account book ” (Record, p. 63). He also testified with reference to this book, which he calls the county clerk’s account book (Record, p. 64) :

“ Q. Now, is that the only book kept or that was kept by the county which shows these facts ?

“ A. Yes, sir.”

Then the following occurred :

“ MR. BRYANT : Here is a transcript which we would like to introduce in evidence instead of the original book.

“ THE COURT : Offer your book, and then you may leave the transcript on file.

“ MR. BRYANT : We will offer the book, then, showing the condition of the county’s finances.

“ Plaintiff objected for the reasons last above given ; objection overruled, to which ruling of the court the plaintiff by counsel then and there duly excepted.”

On cross-examination, Mr. NEWELL, the Clerk, also testified (Record, p. 69) :

" Q. This is not the record of the semi-annual statements of the county—that is, the record required under the law; what is that book there as you understand it?

" A. That is the county clerk's account book, as he kept it at that time.

" Q. Account book?

" A. As I understand it. It does not give the semi-annual statements as we give them to-day." * * *

" Q. Well, there is another book in which you record semi-annual statements, is there not?

" A. Yes, sir.

" Q. This is not that book?

" A. This is not such book.

" Mr. BRYANT: We offer the original book [that is, the county clerk's account book], and substitute the copy.

" Mr. JOHNSON: We object to the introduction of this record of the outstanding indebtedness; it is not a semi-annual statement signed by the board of county commissioners, and recorded in a book kept for that purpose, within the intent, purpose and meaning of the statute requiring such a record to be kept; there is no evidence of its record as such.

" Objection overruled. To which ruling of the Court the plaintiff by counsel then and there duly excepted, and exceptions were allowed by the Court.

" Said exhibit was then introduced in evidence and was marked EXHIBIT 9, and was in words and figures as follows:

" Exhibit 9.—Lake County in Account with County Treasurer.—Expenditure (count) to January 1, A. D. 1880.—County Fund."

The said EXHIBIT 9 is set out in full in the Record at pages 70 to 73.

This exhibit shows that it was not made, as section 30 requires, by the board of county commissioners, nor does it show the amount of debt owing by the county, in what it consisted, what payments had been made thereon, the rate of interest, and a detailed account of

the receipts and expenditures for the preceding months, and striking a balance showing the deficit or the balance in the treasury. In the certificate at the end, made by the Clerk and Recorder of the county, it is certified :

“ That the within and foregoing is a true and correct copy of the expenditure, accounts and indebtedness of the county of Lake from January 1, 1880, to January 1, 1881, as it appears of record in my office in the county clerk's account book, pages 1 to 5 (inc.).”

The Circuit Court of Appeals held, and we submit properly held, that this was improperly received by the Circuit Court as evidence. On this subject the Circuit Court of Appeals, referring to this point and to the *Sutliff* case as bearing on it, says (Record, p. 148) :

“ The theory of that case [*Sutliff* case] is that a purchaser of bonds issued under that act [to wit, the act of March 24, 1877] would have constructive notice of what the record of the semi-annual statement provided for by the act, and which it was his duty to examine, would have shown, had he in fact examined such record. *The fact that such record actually existed was assumed and not questioned in the Sutliff case.* But in this case it is clearly shown that there never were any such semi-annual statements, or record thereof, covering any of the time which could affect the legality of these bonds. As there was no such record in existence as the act required and contemplated, there was no record which a purchaser of these bonds was bound to examine, or which would be constructive notice to him of the aggregate indebtedness of the county when the bonds were issued.”

Of course, if it be true, as was both conceded and clearly shown, that there was no record made in a book kept for that purpose only such as the act requires, the defense that such a record, if kept, would be constructive notice to all the world, has no place in the case. It is a moot question. If no such record book

existed, this fact cuts up by the roots the defense that there was a record made under section 30 showing that the county had exceeded the constitutional limitation, since there can be no such thing as constructive notice of a record which was not kept, and which had no existence. This was the view taken by the Circuit Court of Appeals, who on this point said (Record, p. 148) :

" But in this case [in the Circuit Court of Appeals] it is clearly shown that *there never were any such semi-annual statements, or record thereof, covering any of the time which could affect the legality of these bonds.* As there was no such record in existence as the act required and contemplated, there was no record which a purchaser of *these* bonds was bound to examine, or which would be constructive notice to him of the aggregate indebtedness of the county when the bonds were issued. *Such purchaser was therefore entitled to rely on the recitals in the bonds.* And as one of these recitals was a certificate that all the provisions of the act had been fully complied with by the proper officers in the issuing of the bonds, and as a provision of that act limiting the issue of the bonds by the aggregate of all the indebtedness of the county was in effect identical with the constitutional provision on the same subject, the recital was equivalent to a certificate that this provision of the Constitution had been complied with, and brings the case within the decision in *Chaffee County v. Potter, supra.*

" It has often been held that in the absence of any statutory public record, a county or municipality may be estopped by similar recitals in bonds, from showing that when the bonds were issued there was an aggregate outstanding indebtedness rendering the issue of bonds illegal."

" *Marcy vs. Oswego*, 92 U. S., 637.

" *Humboldt vs. Long*, 92 U. S., 642, 645.

" *Buchanan vs. Litchfield*, 102 U. S., 278, 292.

" *Sherman vs. Simons*, 109 U. S., 735.

" *Dallas vs. McKenzie*, 110 U. S., 686.

" *Wilson vs. Sulamanca*, 99 U. S., 499."

"The debt created by the bonds in this case was incurred, not at the time the Board of Commissioners determined that it was necessary, nor when the qualified voters of the county gave authority to incur it, nor at the date of the bonds, they having been antedated, but at the date, later than September 6, 1880, when the bonds were in fact issued and sold. The bonds recite that the whole issue is \$50,000, and this recital was notice to purchasers of the bonds of the creation of an indebtedness of the county to that amount. The assessed valuation of the taxable property of the County of Lake, according to the assessment which was completed by equalization on September 1, 1880, was \$11,124,489. This assessed valuation, in view of the vote authorizing the creation of the indebtedness, would admit of a lawful aggregate of indebtedness of that county, to the extent of upwards of \$66,000. So that the recited amount of that issue of bonds was not of itself notice to a purchaser that the lawful aggregate limit of indebtedness had been passed, even if such purchaser was bound to take notice of the assessed valuation of the taxable property of the county, as was held in *Dixon vs. Field*, 111 U. S., 83. As said by the Court in *Chaffee County vs. Potter*, 142 U. S., 355, 363, "The purchaser might even know, indeed it may be admitted that he would be required to know, the assessed valuation of the taxable property of the county, and yet he could not ascertain, by reference to one of the bonds and the assessment roll, whether the county had exceeded its power, under the Constitution, in the premises."

"The Court therefore erred in overruling the plaintiff's objections to the County Clerk's account book, the Warrant Register and the proof of publication of financial statements. None of this evidence was material, as none of it constituted constructive notice to a *bona fide* purchaser of the bonds."

It therefore follows that the action of the Circuit Court of Appeals, in holding that the reception of this evidence was error, was correct, and its reversal of a judgment wherein the Circuit Court peremptorily directed a verdict for the defendant was correct, material improper evidence having been received. This

alone leads to an affirmance of the judgment of the Circuit Court of Appeals.

VIII.

Other errors in the record justified and required the judgment of reversal. The Circuit Court also erred in admitting in evidence over plaintiff's objection and exception transcripts from the records of Lake County showing the issuance of county warrants, the amount of them from day to day, the numbers of them, &c., beginning October 7, 1879, and ending December 31, 1879, &c. (record, pp. 73, 74).

This evidence was admitted over the plaintiff's objection against the plaintiff, a *bona fide* holder of bonds, reciting that they had been issued under and in full compliance with the act authorizing their issue, on the theory that even such a holder was bound to take notice of the indebtedness of the county as shown by the county warrants, warrant register, &c.

This is an extension of the doctrine of constructive notice beyond what was ever claimed before, and in direct conflict with the many decisions of this court above referred to that the bona fide purchaser of such a bond cannot be required to make such an impracticable inquiry.

See on this point especially the case of *Marcy vs.*

Township of Oswego, above cited (*ante*, p. 25) that the recitals in the case at bar create an estoppel on the county, and see particularly the case of *Evansville vs. Dennett*, 161 U. S., 434, referred to at length in our brief in the case of *Gunnison County vs. E. H. Rollins & Sons*, page 65, in which case it was held that a holder of bonds with recitals substantially similar to those in the present bond was not obliged to notice a resolution duly spread on the records of Evansville specified in the bond by date.

Similar proof was admitted against the plaintiff by the Circuit Court in the case of *County Commissioners of Gunnison vs. E. H. Rollins & Sons*, No. 178, on this docket, and was held by the Circuit Court of Appeals to be incompetent.

THAYER, J., giving the opinion of that court, referring to this class of testimony, says:

"It follows from the views which we have heretofore expressed, that the lists of warrants in question were inadmissible against a *bona fide* purchaser of bonds, to contradict and overcome the recitals which the bonds in controversy contain. A purchaser of such securities for value, in the open market, can neither be expected nor required to examine the warrants issued for the original indebtedness, with a view of ascertaining when the debt was contracted, especially when the bonds contain such explicit representations as the bonds in suit contain. No case, we believe, has ever imposed a burden of that kind upon the bondholder."

Record in that case, p. 1-5.

The recitals in the bonds now in suit against Lake County are just as effectual as an estoppel against a resort to the warrants or warrant register as the more particular recitals in the bonds issued by Gunnison County and referred to by the Court of Appeals. Indeed, the broad claim is made by the counsel for the

county both in the briefs in this case and in the Gunnison County case above referred to, that a *bona fide* purchaser of negotiable municipal bonds is bound, no matter what the recitals in those bonds may be, to take notice of any and all public records of the county of every name, nature or description, and even account books of the county, showing, or tending to show, the indebtedness of the county; and this in the absence of any statute making them constructive notice, and in the face of the recital in the bonds that they are rightfully issued. No wonder the trial court said, when such evidence was offered (Record, p. 62): "This case takes very broad grounds. I will let the Court of Appeals decide that question, and will admit the proof."

We submit, therefore, that, to sustain the contention of the county's counsel, and to hold that the *bona fide* purchaser must take notice of all the books and accounts of the county, such as the register of county warrants, the register of the county treasurer, the account books between the county and its treasurer, would be to overrule a long line of decisions made by this court, and invalidate millions of bonds already issued on the faith of those decisions, and destroy the marketability of such bonds for the future. Besides, a county may have debts resting in contract, and not evidenced by any warrant or registration of warrants, and it does not follow that, by examining the warrant and bond registers of a county, the extent of its indebtedness can be surely ascertained. If this be true, there is no such thing left as negotiability in the sense of the law merchant of any municipal bond, so far as respects debt limit or any other condition annexed to the right to issue the same.

IX.

There was power in the County to issue bonds.

The learned counsel for the county cites a number of decisions of this court where this court has stated in substance that, if there is an *entire want of power* in a municipality to incur an indebtedness, there can be no recital to estop the municipality as respects any indebtedness attempted to be incurred. The proposition which he states is, it is true, well settled, that where there is an entire absence of power (which means that there is no statute which authorizes a municipality *on any state of facts or under any circumstances*) to issue municipal bonds, in such case there can be no recital to estop the municipality. But that is not the present case. Here there was power to issue bonds. The only limitation is a limitation as to the amount. The proposition which he states and the cases referred to by him on that proposition, have absolutely no bearing whatever. It has been many times held by this court that where there is statute authority to issue bonds, but where there is also some limitation or condition attached to their issue (as, for example, by the constitution, that the bonds shall not be issued without a vote of the people) bonds issued without complying with the condition or limitation are, nevertheless, not void *for want of power*; but that in such a case the power to issue exists, and the want of a vote or other failure to comply with conditions or limitations is only available as against holders with notice. When this court in its decisions has spoken of entire want of power in a municipality to issue bonds, it has meant a

case where the legislature has never undertaken to authorize the issue under any circumstances whatever. It is like a case where a court has no jurisdiction to deal with the subject; whereas the present case is like a case where a court has jurisdiction, but where, under the contention of counsel, it has made a wrong decision. There is no more want of power to issue the bonds without a vote of the people having been taken than there is to issue bonds where the debt limit has been exceeded.

It has been many times held by this court in the numerous cases cited in this brief, and in our brief in the *Gunnison case*, that if under the constitution and statutes power is conferred to issue municipal bonds, but a limit is placed upon the amount which may be issued such bonds are good in the hands of *bona fide* holders without notice of the limit having been exceeded wherever it is recited that the bonds are issued "under and pursuant to" the enabling act. It is a misnomer and a solecism to say that in such a case there is a want of power. All of these decisions are directly in the teeth of the proposition of the learned counsel for the county. The learned counsel has undertaken to draw a curious distinction between cases where a debt limit is the defense and other cases where the failure to perform some other condition or limitation has occurred. He says that, if the debt limit is transcended, it is necessarily, and under all circumstances, and against all persons, fatal. He admits that if their conditions are not met the bonds may be good, nevertheless, in the hands of *bona fide* holders. Accordingly, counsel says (Brief, pp. 60, 61):

"We do not believe that there will be any question but what the recital in the bond by the proper county

officers that an election had been held and the debt had been authorized would be binding upon the county; but no legislative provision authorizing a county to incur a debt beyond a limit laid down in the constitution, or any act upon the part of the county officers of the entire State and county government could give validity to a county debt incurred in violation of this constitutional provision."

It is a sufficient answer to this proposition to cite the case of *Chaffee County vs. Potter, supra*, and the numerous other cases referred to in this brief and in the Gunnison county brief.

X.

If the said Financial Statement, Exhibit B, had been recorded, as required, in a book kept for that purpose only, still the so-called financial statement can not be introduced in evidence as against the bona fide holders of the bonds in question containing such recitals as these bonds contain.

On this proposition we respectfully refer the Court to our brief in case No. 178, *Gunnison County vs. E. H. Rollins & Sons*, Point VI., pp. 60 to 103, inclusive.

XI.

The trial court erred in admitting in evidence the orders and proceedings of the county court authorizing the issue of the

bonds in question as against a bona fide holder of the bonds with the recitals therein contained. "That this bond is issued * * * under and by virtue of and in full conformity with the provisions of the act," &c.

On this point we respectfully refer to our argument in the cases of *Commissioners of Gunnison County vs. E. H. Rollins & Sons*, No. 178, pp. 108 to 111.

XII.

Burden of proof in actions on negotiable bonds.

On this point we respectfully refer to our argument in the case of *Commissioners of Gunnison County vs. E. H. Rollins & Sons*, No. 178, pages 111 to 121.

XIII.

Validation of these bonds by the Constitutional Amendment of 1888.

See on this subject the brief of associate counsel filed herein, which, covering the whole subject, we do not discuss it in this brief.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
EDMUND F. RICHARDSON,

Counsel.

APPENDIX.

I.

Sections 21 to 25 of the statute of Colorado approved March 24, 1877, being all of said statute which makes any provisions as to the issue of such bonds.

" 448. SEC. 21. When the county commissioners of any county shall deem it necessary to create an indebtedness for the purpose of erecting necessary public buildings, making or repairing public roads or bridges, they may, by an order entered of record specifying the amount required and the object for which such debt is to be created, submit the question to a vote of the people, at a general election; and they shall cause to be posted a notice of such order in some conspicuous place in each voting precinct in the county, for at least thirty days preceding the election, and all persons voting on that question shall vote by separate ballot, whereon is placed the words 'for county indebtedness,' or 'against county indebtedness;' such ballots to be deposited in a box provided by the county commissioners for that purpose, and no person shall vote on the question of indebtedness unless he shall have the necessary qualifications of an elector as provided by law, and shall have paid a tax upon property assessed to him in such county for the year immediately preceding; and, if upon canvassing the vote (which shall be canvassed in the same manner as the vote for county officers), it shall appear that a majority of all the votes cast are for county indebtedness, then the county commissioners shall be authorized to contract the debt in the name of the county: *Provided*, That the aggregate amount of indebtedness of any county, exclusive of debts contracted prior to July first, 1876, in which the assessed valuation of property shall exceed one million of dollars, for all purposes, shall not be in excess of the following ratio, to wit: Counties in which the assessed valuation of property

shall exceed five millions of dollars, six dollars on each thousand dollars thereof; counties in which the assessed valuation of property shall be less than five millions and exceed one million of dollars, twelve dollars on each thousand dollars thereof.

" 449. SEC. 22. The county commissioners, when authorized as provided in section twenty-one of this act, shall make and issue coupon bonds of this county, not exceeding the amounts specified in the preceding section, in counties which have an assessed property valuation exceeding one million of dollars, payable at the pleasure of the county, ten years after the date of their issuance, but absolutely due and payable twenty years after such date, bearing interest at the rate of not exceeding ten per cent. per annum from their date until paid. Said interest payable on the first day of April of each year, and the principal, when due, at the office of the county treasurer of the county; and the county commissioners shall prescribe the form of said bonds and the coupons thereto, and to provide for the annual interest accruing on the bonds they shall levy annually a sufficient tax to fully discharge such interest; and for the ultimate redemption of such bonds they shall levy annually, after ten years from the date of such issuance, such tax upon all taxable property in their county as shall create a yearly fund equal to ten per cent. of the whole amount of such bonds issued; and all taxes for interest on and the redemption of such bonds shall be paid in cash only, and shall be kept by the county treasurer as a special fund to be used in the payment of interest on and redemption of such bonds only; such taxes to be levied and collected as other taxes.

" 450. SEC. 23. When it shall appear to the board of county commissioners, upon examination of the books and accounts of the county treasurer, that there are sufficient funds in his hands to the credit of the redemption fund to pay in full the principal and accrued interest of any of such bonds, it shall be the duty of such board immediately to call in and pay as many of such bonds and accrued interest thereon as the funds ascertained to be on hand will liquidate, and said board shall thereupon cancel such redeemed bonds, and all uncanceled interest coupons issued therewith. The bonds shall be called in and paid in the order of their issuance, as nearly as may be practicable, and when it is desired to redeem any of such bonds by said

board, they shall cause to be published for thirty days, in some newspaper at or nearest the county seat of the county, a notice that certain county bonds (specifying the numbers and amounts) will be paid upon presentation, and at the expiration of such thirty days said bonds shall cease to bear interest.

" 451. SEC. 24. The bonds issued as heretofore provided shall be signed by the chairman of the board of county commissioners and attested by the clerk of the county and bear the seal of the county upon each bond, and shall be numbered and registered in a book kept for that purpose in the order in which they are issued. Each bond shall state upon its face the amount for which the same is issued, to whom issued and the date of its issuance ; but no bond shall be of a less denomination than fifty dollars, and, if issued for a greater amount, then for some multiple of that sum ; and the aggregate amount of such bonds issued shall not exceed the sum entered of record by the board of county commissioners, as required in section 21 of this act, and any bond issued in excess of said sum shall be null and void.

" 452. SEC. 25. The board of county commissioners shall have the right to sell any of such bonds, but no bond shall be sold unless for cash, and not then at a discount of more than 15 per cent. on its par value. The money arising from the sale of such bonds shall be forthwith used for the objects for which the debt was created, and for no other purpose whatever. When any such bonds or any coupons shall be redeemed, the board of county commissioners shall, in the presence of the clerk of said board or his deputy, cancel such bonds or coupons by writing the word 'canceled' on the face of such bonds or coupons, and said board shall make a record of the proceedings, stating what bonds or coupons were cancelled."

II.

**Section 30 and other provisions of the
Statute of Colorado Approved March
24, 1877.**

[*Session Laws, Colorado, 1877, pp. 218, 227.*]

An act entitled "An act concerning counties, county officers and county government and repealing laws on these subjects," approved March 24, 1877, contained the following provision :

"SEC. 30. It shall be the duty of the Board of County Commissioners of each county to make out semi-annual statements at the regular sessions in January and July, at which times they shall have such statement published in some weekly newspaper published in the county, if there be such published; and, if there be no newspaper published in the county, such Commissioners shall cause such statements to be posted in three conspicuous places in said county, one of which shall be the Court House door, and such statement shall show the amount of debt owing by their county, in what the debt consists, what payments, if any, have been made upon the same, the rate of interest that such debts are drawing, also a detailed account of the receipts and expenditures of the county for the preceding months, in which shall be shown from what officer and on what account any money has been received, and the amounts, and to what individuals and on what account any money has been paid, and the amounts; and shall strike the balance, showing the amount deficit, if any, and the balance in the treasury, if any, and the *statement thus made, in addition to being published as before specified, shall also be entered of record by the Clerk of the Board of County Commissioners in a book to be by him kept for that purpose only, which book shall be open to the inspection of the public at all times.*"

NOTE.—The above section 30 is carried into the General Laws Compilation of 1887 and numbered therein as Section 457 of such Compilation.

We have given an analysis of these provisions of the said act of March 24, 1877, at page 78 of our brief in the case of **Gunnison County vs. Rollins, No. 178**, to which we call the special attention of this court.

III.

County debt limit provisions of Constitution of Colorado.

Section 6 of Article XI. of the Colorado State Constitution, as it stood prior to the amendment of 1888, was as follows (General Statutes, Colorado, 1883, p. 62) :

" No county shall contract any debt by loan, in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges, and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county following—to wit : Counties in which the assessed valuation of taxable property shall exceed \$5,000,000, \$1.50 on each thousand thereof ; counties in which such valuation shall be less than \$5,000,000, \$3 on each thousand dollars thereof. And the aggregate amount of indebtedness of any county for all purposes, *exclusive of debts contracted before the adoption of this Constitution*, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt ; but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned : *Provided, That this*

section shall not apply to counties having a valuation of less than \$1,000,000."

Section 6 of Article XI. of the Colorado State Constitution, as amended in A. D. 1888 (Mills' Annotated Statutes, Colorado, 1891, p. 326), is as follows :

"No county shall contract any debt by loan, in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges, and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county following, to wit : Counties in which the assessed valuation of taxable property shall exceed \$5,000,000, \$1.50 on each \$1,000 thereof ; counties in which such valuation shall be less than \$5,000,000, \$3 on each \$1,000 thereof ; and the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this Constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county ; and a majority of those voting thereon shall vote in favor of incurring the debt, but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned.

"Provided, that any county in this State which has an indebtedness outstanding, either in the form of warrants issued for purposes provided by law, prior to December 31, A. D. 1886, or in the form of funding bonds issued prior to such date for such warrants previously outstanding, or in the form of public building, road or bridge bonds outstanding at such date, may contract a debt by loan by the issuance of bonds for the purpose of liquidating such indebtedness ; Provided, The question of issuing said bonds shall, at a general or special election called for that purpose, be submitted to the vote of such of the duly qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed in such county, and the majority of those

voting thereon shall vote in favor of issuing the bonds. Such election shall be held in the manner prescribed by the laws of this State for the issuance of road, bridge and public building bonds, and the bonds authorized at such election shall be issued and provisions made for their redemption in the same manner as provided in said law."

The change made in 1888 consisted in leaving out the old provisos and adding the new ones, the said old and new provisos being quoted above in italic.

No. 177.

U. S. COURT
FILED

DEC 14 1898

JAMES H. MCKENNEY,
Clerk.

Br. of Parks for Respondent

In the Supreme Court of the United States.

Filed Dec. 14, 1898.
October Term, 1898.

THE BOARD OF COUNTY COM-
MISSIONERS OF LAKE COUNTY,

Petitioner,

VS.

HARRY H. DUDLEY,

Respondent.

No. 177.

*On Writ of Certiorari to the United States Circuit Court
of Appeals for the Eighth Circuit.*

(16687.)

Brief and Argument of Daniel E. Parks for Harry
H. Dudley, Respondent.

DANIEL E. PARKS,

Attorney for Relator.

In the Supreme Court of the United States.

October Term, 1898.

THE BOARD OF COUNTY COM-
MISSIONERS OF LAKE COUNTY,

Petitioner,

vs.

HARRY H. DUDLEY,

Respondent.

No. 173.

*On Writ of Certiorari to the United States Circuit Court
of Appeals for the Eighth Circuit.*

(16687)

Brief and Argument of Daniel E. Parks for Harry H. Dudley, Respondent.

Concurring in the opening brief made and filed herein on the part of the respondent, I desire, in reply to the brief of defendant in error, to amplify somewhat the following points, viz.:

First: POINT III—Suit by assignee.

Second: POINT VI—Proof of Outstanding Debt, and

Third: POINT VII—Validation of Amendment.

STATEMENT.

The following is the amendment to Section 6 of Article XI of the Constitution of Colorado, under discussion, the whole section as amended being set forth in the opening brief, viz.:

"PROVIDED, That any County in this State which has an indebtedness outstanding, either in the form of warrants issued for purposes provided by law prior to December 31, A. D. 1886, or in the form of funding bonds issued prior to such date for such warrants previously outstanding, or in the form of public building, road or bridge bonds outstanding at such date, may contract a debt by loan by the issuance of bonds for the purpose of liquidating such indebtedness, provided the question of issuing said bonds shall, at a general or special election called for that purpose, be submitted to the vote of such of the duly qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed in such county, and the majority of those voting thereon shall vote in favor of issuing the bonds. Such election shall be held in the manner prescribed by the laws of this State for the issuance of road, bridge and public building bonds, and the bonds authorized at such election *shall be issued* and provision made for their redemption in the same manner as provided in *said law*."

Section 6, Article XI, Constitution of Colorado (Mills' Ann. Sts., Vol. 1, 326).

And the following is the law effectuating such amendment, which was *in existence* and *full force* at the *very time* the amendment was submitted and adopted, viz.:

‘671: DEBT FOR ROADS, BRIDGES, ELECTION, PROCEEDINGS, CANVASS OF ELECTION—
AGGREGATE AMOUNT.

“Sec. 151 (21). When the County Commissioners of any county shall deem it necessary to create an indebtedness for the purpose of erecting necessary public buildings, making or repairing public roads or bridges, they may, by an order entered of record specifying the amount required and the object for which such debt is to be created, submit the question to a vote of the people, at a general election; and they shall cause to be posted a notice of such order in some conspicuous place in each voting precinct in the county, for at least thirty days preceding the election, and all persons voting on that question shall vote by separate ballot, whereon is placed the words ‘For County Indebtedness,’ or ‘Against County Indebtedness;’ such ballots to be deposited in a box provided by the County Commissioners for that purpose, and no person shall vote on the question of indebtedness unless he shall have the necessary qualifications of an elector as provided by law, and shall have paid a tax upon property assessed to him in such county for the year immediately preceding, and if, upon canvassing the vote (which shall be canvassed in the same

manner as the vote for county officers), it shall appear that a majority of all the votes cast are for county indebtedness, then the County Commissioners shall be authorized to contract the debt in the name of the county: *Provided*, That the aggregate amount of indebtedness of any county, exclusive of debts contracted prior to July 1st, 1876, in which the assessed valuation of property shall exceed one million of dollars, for all purposes, shall not be in excess of the following ratio, to wit: Counties in which the assessed valuation of property shall exceed five millions of dollars, six dollars on each thousand dollars thereof; counties in which the assessed valuation of property shall be less than five millions, and exceed one million of dollars, twelve dollars on each thousand dollars thereof." (Sec. 448 (21), p. 223, G. L.)

"672. COUNTY BONDS—INTEREST—TAX—AMOUNT—
REDEMPTION.

"Sec. 152 (22). The County Commissioners, when authorized as provided in section twenty-one of this act, shall make and issue coupon bonds of the county, not exceeding the amounts specified in the preceding section, in counties which have an assessed property valuation exceeding one million of dollars, payable at the pleasure of the county, ten years after the date of their issuance, but absolutely due and payable twenty years after such date, bearing interest at the rate not exceeding ten per cent per annum from their date until paid. Said

interest payable on the first day of April of each year, and the principal, when due, at the office of the County Treasurer of the county; and the County Commissioners shall prescribe the form of said bonds, and the coupons thereto; and to provide for the annual interest accruing on the bonds, they shall levy annually a sufficient tax to fully discharge such interest; and for the ultimate redemption of such bonds, they shall levy annually, after ten years from the date of such issuance, such tax upon all taxable property in their county as shall create a yearly fund equal to ten per cent of the whole amount of such bonds issued; and all taxes for interest on, and the redemption of such bonds shall be paid in cash only, and shall be kept by the County Treasurer as a special fund, to be used in the payment of interest on, and redemption of such bonds only; such taxes to be levied and collected as other taxes." (Sec. 449 (22), p. 224, G. L.)

"673. REDEMPTION OF BONDS—NOTICE—INTEREST—
ORDER OF PAYMENT.

"Sec. 153 (23). When it shall appear to the Board of County Commissioners, upon examination of the books and accounts of the County Treasurer, that there are sufficient funds in his hands to the credit of the redemption fund to pay in full the principal and accrued interest of any of such bonds, it shall be the duty of such board immediately to call in and pay as many of such bonds and accrued interest thereon as the funds ascertained to be on

hand will liquidate, and said board shall thereupon cancel such redeemed bonds, and all uncanceled interest coupons issued therewith. The bonds shall be called in and paid in the *order of their issuance*, as nearly as may be practicable, and when it is desired to redeem any of such bonds by said board, they shall cause to be published for thirty days, in some newspaper at or nearest the county seat of the county, a notice that certain county bonds (specifying the number and amounts) will be paid upon presentation, and at the expiration of such thirty days said bonds shall cease to bear interest." (Sec. 450 (23), p. 224, G. L.)

"674. ~~BONDS—SIGNED—ATTEST—DENOMINATION—~~
~~AMOUNT.~~

"Sec. 154 (24). The bonds issued as heretofore provided, shall be signed by the chairman of the Board of County Commissioners, and attested by the Clerk of the county, and bear the seal of the county upon each bond, and shall be numbered and registered in a book kept for that purpose, in the order in which they are issued. Each bond shall state upon its face the amount for which the same is issued, to whom issued, and the date of its issuance; but no bond shall be of a less denomination than fifty dollars, and, if issued for a greater amount, then for some multiple of that sum; and the aggregate amount of such bonds issued shall not exceed the sum entered of record by the Board of County Commissioners, as required in Section 21

of this act, and any bond issued in excess of said sum shall be null and void. (Sec. 451 (24), p. 225, G. L.)

"675. SELLING BONDS—RATE—REDEMPTION—CANCELLATION—HOW FUNDS USED.

"Sec. 155 (25). The Board of County Commissioners shall have the right to sell any of such bonds, but no bond shall be sold unless for cash, and not then at a discount of more than 15 per cent on its par value. The money arising from the sale of such bonds shall be forthwith used for the objects for which the debt was created, and for no other purpose whatever. When any such bonds or any coupons shall be redeemed, the Board of County Commissioners shall, in the presence of the clerk of said board or his deputy, cancel such bonds or coupons by writing the word 'canceled' on the face of such bonds or coupons, and said board shall make a record of the proceedings, stating what bonds or coupons were canceled." (Sec. 452 (25), p. 225, G. L.)

"670. SEMI-ANNUAL STATEMENTS OF INDEBTEDNESS BY COMMISSIONERS—CONTENTS—NOTICE—PUBLICATION—POSTED—RECORDED.

"Sec. 150 (30). It shall be the duty of the Board of County Commissioners of each county to make out semi-annual statements at the regular sessions in January and July, at which times they shall have such statement published in some weekly

newspaper published in the county, if there be such published; and if there be no newspaper published in the county, such Commissioners shall cause such statements to be posted in three conspicuous places in said county, one of which shall be the court house door; and such statement *shall* show the amount of debt owing by their county, in what the debt consists, what payments, if any, have been made upon the same, the rate of interest that such debts are drawing, also a detailed account of the receipts and expenditures of the county for the preceding months, in which shall be shown from what officer and on what account any money has been received, and the amounts and to what individuals and on what account any money has been paid, and the amounts; and shall strike the balance, showing the amount deficit, if any, and the balance in the treasury, if any, and the statement thus made in addition to being published as before specified shall also be entered of record by the clerk of the Board of County Commissioners in a book to be by him kept for that purpose only, which book shall be open to the inspection of the public at all times." (Sec. 457 (30), pp. 227-8, G. L.)

This statute will be found in the following named books, viz.: General Statutes of Colorado, 1883, Sections 671 to 676, inclusive. General Laws of Colorado, 1877, Sections 448 to 452, and Section 457. Mills' Annotated Statutes of Colorado, Sections 933 to 939. The text of this statute, as above given, is copied *verbatim* as to text and punctua-

tion, from the General Laws of Colorado of 1877, at pages 223 to 225, also 227 and 228. The law as it is given by the laws of 1877 *was* and *is* the law as it existed when the bonds in suit were issued. And this statute was printed upon the back of each of the bonds excepting Section 457, which was not printed. (Record, pages 27 to 29, inclusive.)

I.

There is no force in the position of defendant in error concerning the question of the jurisdiction of the Court below of the subject matter of this litigation, or of the parties to this action. Section 1 of the Act of March 3, 1887 (24 U. S. Stats. at Large, 553), specifically confers such jurisdiction, this action being upon negotiable coupons payable to bearer, cut from the negotiable coupon bonds issued by the defendant in error, a political governmental CORPORATION, under the laws of Colorado (Mills' Anno. Statutes, Colo., Vol. I, Chapter 33, page 744, Section 774, *et seq.* Id., page 727, Section 731, and laws cited), which coupons, as well as the bonds, became the property of the purchaser and holder *absolutely*, by delivery, the title passing *absolutely* and beyond recall, in this case, under the bills of sale in evidence. (Record, pages 35 to 39, inclusive.) The plaintiff in error in this case, therefore, having the legal title to the causes of action herein, by PURCHASE, CONVEYANCE and DELIVERY, his title is not that of an ASSIGNEE, but that of owner and holder of the *integral body* of the secur-

ity itself, by conveyance and delivery thereof, as evidenced in this case. Such a case is within the *exceptions* of Section 1 of the Act of Congress of 1887, as amended in 1888, so far as the Jones and Stanley coupons and bonds are concerned, and this action of the plaintiff in error is maintainable thereon, the Court below having jurisdiction of the parties as well as of the subject matter of the action. *Newgass vs. New Orleans*, 33 Fed. Rep., 106-109; *Rollins vs. Chaffee Co.*, 34 Id., 91-93; *Jerome vs. Commissioners*, 18 Id., 873.

The foregoing cases are directly in point as to the construction of the act cited. The following cases are also analogous, being constructions of other similar statutes, but enunciating principles which are applicable to the construction of Section 1 of the Act of March 3, 1887: *Perrine vs. Town of Thompson*, 17 Blatchford, 10, and cases cited. In that case the Court said: "The evidence would not have authorized the jury to find that the plaintiff's purchase of the coupons in suit was colorable and fictitious merely. Quite likely he bought them *mainly with the object of bringing suit upon them in this Court, and intending, if he collected, to pay over a portion of the recovery to some other person*; and perhaps the jury would have been justified in finding that the coupons *were sold by the owner, as well as bought by the plaintiff, with this understanding*. Nevertheless, *the plaintiff acquired the legal title*, and, this being so, the motive of the transaction is not material." *McDonald vs. Smalley*, 1 Peters,

620; *Smith vs. Kernochen*, 7 How., 198, 216. "The plaintiff is not an assignee, but acquired his title by delivery, and the coupons are promissory notes within Section 1 of the Act of March 3, 1875. 18 U. S. Stat. at Large, 470; *Cooper vs. Town of Thompson*, *supra*, and cases there cited;" *Jones vs. League*, 18 Howard, 76; *Cooper vs. Town of Thompson*, 13 Blatchford, 434, and cases cited; *Briggs vs. French*, 2 Sum., 252; *Newby vs. Ogden Central Ry.*, 1 Sawyer, 63.

The holder of coupons payable to bearer is *not the assignee* of a cause of action. He acquires title by delivery, and the promise to pay the bearer in the coupon is a promise to pay him directly. *City of Lexington vs. Butler*, 14 Wallace, 283.

In *Commissioners vs. Bolles*, 94 U. S., 104, the action was upon bonds, a large part of which were "owned by other persons, who deposited them with plaintiff for collection," and the Court said: "They (the holders) can call to their aid the fact that their predecessors in ownership were such (*bona fide*) purchasers. *To the rights of such purchasers they have succeeded.* Certainly the Railroad Company paid for the bonds and coupons by giving an equal amount of stock, which the county now holds." Again it appears from the testimony of witness Wright (record, pages 18 to 25), and that of witness Dudley (record, page 49), that David Craig, J. H. Jagger, Henry D. Holly, L. C. Hubbard, The Nashua Savings Bank and The Union Five Cents Savings Bank, from whom the plaintiff purchased

the greater part of the bonds and coupons in suit, are *not citizens* of the State of Colorado, therefore the Court below had jurisdiction of this action, regardless of the status of the *Stanley* and *Jones* bonds and coupons. But the Court below also had jurisdiction of the action on account of the *Jones* and *Stanley* coupons and bonds as well. As stated in the beginning of this point, there is therefore nothing in the contention of the defendant in error concerning the jurisdiction of the Court below as to any of the causes of action in suit. Aside from that, the question was not properly raised by plea in abatement in apt time. The general answer in bar waived the plea in abatement to the jurisdiction involved in the question of ownership.

The whole matter must be covered by a plea in abatement (2 B. & P., 420). Cannot be pleaded after making defense (1 Chitty Pl., 441; 6 Lond. Ed.). Must be pleaded before plea to the merits (6 Met., 224; 11 Cush., 164; 21 Vt., 52; 40 Me., 218; 22 Barbour, 244; 14 Ark., 445; 35 Me., 121; 15 Ala., 675; 19 Conn., 493; 1 Iowa, 165; 4 Gill (Md.), 166).

Defendant, by answering in bar and to the merits, waives plea in abatement (Foster Pl., 228, Note 2, and cases; *Livingston vs. Storey*, 11 Peters, 351, etc.).

By pleading over in bar, a party waives all pleas in abatement (*B. and O.R.R.Co. vs. Harris*, 12 Wallace, 65; *Cook vs. Burnley*, 11 Wallace, 659; *Jolly vs. Pryor*, 33 N. W. Rep., 889; *N. Hudson Co. Ry. vs. Flannagan*, 57 N. J. Law, 236).

II.

The evidence comprised in the supposed semi-annual statement offered by defendant, and received in evidence on the trial below (record, pages 99 and 103, inclusive), to prove and establish the outstanding indebtedness of the defendant county, at the time of the issuance of the bonds and coupons in question, was incompetent, and should not have been admitted, for any and all of the reasons stated in the objections made by the plaintiff. (Record, pages 97-99.) The evidence was incompetent, and therefore immaterial, because: 1st. It was not authentic. 2d. It did not *strictly* comply with the statute. 3d. There is no evidence accompanying it showing that the Board of County Commissioners ever made the same, officially or otherwise, or signed and executed it and had it recorded in the office of the County Clerk, as the law requires. 5th. But simply *purports*, without the antecedent proof necessary to authorize its introduction, to be a semi-annual statement. 5th. It purports *only* to be signed by somebody and copied out of some newspaper. 6th. The warrant indebtedness therein enumerated may have all been paid before the issuance of the bonds, and there is no sufficient proof to the contrary. 7th. There is no evidence showing or proving that the supposed original of the supposed copy of the statement was ever entered of record by the clerk of the defendant Board of County Commissioners, in a book kept by him for that purpose only, as re-

quired by Section 457 of the General Laws of Colorado of 1877, in force at that time. 8th. It appears by the evidence of witness Newell (record, pages 63 to 70, inclusive), that no such book or record was kept at the time and that no such record then made was in the office of the Clerk and Recorder of said defendant county, said Clerk and Recorder being *ex-officio* clerk of said defendant board. (Mills' Anno. Stats. of Colo., Vol. 1, Sec. 829.) 9th. The said supposed semi-annual statement is defective in not showing the following matters required by the statutes cited, under which it purports to be issued, viz.: (a.) It does not show on its face what payments, if any, had been made upon the supposed debts therein enumerated, (b.) Nor the rate of interest borne by said supposed debts. (c.) Nor what the debts consist of. (d.) Nor a detailed account of the receipts and expenditures of the defendant county. (e.) Nor does it show from what officer or on what account moneys had been received, if any. (f.) Nor does it show the amounts paid on the indebtedness, nor on what accounts such moneys have been paid, and the sums. (g.) Nor does it show the amount of deficit, or balance, in the treasury, nor anything upon that subject. (h.) Nor does the said supposed statement purport to give, nor does it show, a detailed account of the receipts and expenditures of said defendant county, for the preceding six months. (i.) Nor state the time when the receipts and expenditures dealt with were had and

made. 10th. The proof of publication of the said supposed copy of the supposed original statement is insufficient and inadmissible, for the reason that it does not show the proof made, if any was made, *at the time* of the supposed publication of the original statement. 11th. There was no evidence that proof of publication was ever made at the time of such publication, or upon the supposed original, as required by law or otherwise. If so, such proof would necessarily bear date as of the time of publication, whereas, the proof of publication attached to the supposed copy of the supposed statement was made December 16, A. D. 1893, more than 13 years after the date of such statement and its supposed publication. 12th. The affidavit of C. C. Davis, attached to the supposed statement, is therefore incompetent, and cannot be received to prove such publication in place of the *original* evidence of publication required by law, which would be recorded with the record of the statement, if such record was ever made. 13th. The said supposed copy of the said supposed original statement shows on its face it was not and could not be a copy of the supposed original, for the reason that the original proof of publication annexed to the original statement would of necessity bear date as of the date or near the date of the publication of the original. 14th. The original itself would be inadmissible as evidence without proof of publication attached thereto, and such original may not be evidenced

by copy, unless in due time and form, made, published and filed, with proof of publication attached, with the clerk of the defendant Board of County Commissioners, and by him recorded in a book kept by him for that purpose, as required by said section of said law cited. 15th. Without competent proof of publication, the said supposed copy statement, or its supposed original, could not be admitted as evidence of the supposed facts which they contain. 16th. There is no proof whatever of the existence of the supposed original of the supposed copy of the statement, or that it was made and executed by any or either of the officers who purport to have executed the same. 17th. For aught that appears in the evidence adduced on the trial, the supposed original was never made or executed, by any authority whatever. And there is no evidence that the county board, as a board, made up the supposed statement.

The said supposed semi-annual statement purports to be a statement of the debt outstanding on January 1, 1880, seven months prior to the date of the issuance of the bonds in question. The statement of June 30, 1880, provided for by the law cited, is the only evidence under the statute, of the outstanding debt, which could measure the power to issue the bonds in question, and that was not offered as evidence.

The foregoing points, contained in the objections made on the trial, to the receipt in evidence of the said supposed semi-annual statement (record,

pages 97-99) are relied upon by the respondent to affirm the judgment below, and I now re-state them, as arguments before this Court, showing the *signal error* of the trial Court in admitting said statement in evidence. In my judgment, no more flagrant example of the disregard of the rules of evidence, governing the trial of cases in a Court of original jurisdiction, is to be found. It seems to me that each of the several points above made conclusively urge their own correctness by their bare statement, without occupying the time of this Court in the citation of authorities upholding the same. The statute is the rule of action and enforces its own language as such. It is all sufficiently plain.

That the semi-annual statement required by the law cited to be made and recorded on July 1, 1880, was and is the only statement to be taken into account under the statute, as the one affording the rule for determining the power of the county, in issuing the bonds in question, requires no argument for numerous reasons, which will occur to the minds of this Court; such being the *last* statement provided for by the law cited, prior to the issuance of the bonds, could *only* afford the information to the bondholder, required by law. The purchaser of the bonds was required to look no further.

If the law of semi-annual statements of Colorado counties cited, under which the said supposed statement is supposed to have been made, was and is designed to change the rule of evidence afforded

by the common law relative to the proof of the outstanding indebtedness of the counties of Colorado, to the extent of bringing the evidence thereof home to the knowledge of persons dealing with such counties, such statute is in derogation, and against the course, of the common law, and consequently must be *strictly construed*.

Endlich on Statutes, Sections 127 and 128, and cases cited. Especially those cited in note 88, page 174. That author says: "But, in this country, the rule has assumed the form of a dogma, that all statutes in derogation of the common law, or out of the course of the common law, are to be strictly construed." And in Section 128, the same author says: "To the class of statutes falling under this rule belong those changing rules of evidence, permitting persons to be witnesses in their own cases." Sutherland, in his work on the Construction of Statutes, Section 290, says: "It is not supposed that the Legislature intended to make any invasion upon the common law, further than the necessity of the case require. In other words, statutes in derogation of it, and especially of a common law right, are strictly construed." In *Warner vs. Fowler*, 8 Md. Repts., 25-30, the Court said: "Waiving all question as to the alleged generality, under the act of 1825, ch. 117, of the several prayers to be found in the record, we are of opinion that the instruction actually given by the Judge of the Circuit Court was substantially correct. The act of assembly under which the affirmation was

made, is one, in *this particular*, in *derogation* of the course of the common law, and like all such legislation, is to be construed *strictly*. See *Dyson vs. West's Exe'r.*, 1 Har. & John., 567. According to the principles of the common law, a party is denied the right of being a witness in his own case; and under our act of assembly, he is only allowed the privilege if his account does '*not exceed ten pounds, current money, in the course of any whole year, and if it be proved within twelve months after the first article therein charged shall become due, and not otherwise.*' The account in this case ought, in our judgment, to show *affirmatively* on its *face* a compliance with the requisitions of the act of assembly. This not being so, there was no right in the party to make the affirmation, and as a consequence, it was *extra-judicial*." See also *Brown vs. Barry*, 3 Dallas, 365. Turning again to the law of the supposed semi-annual statement cited, and the statement itself, and comparing the statement with the law, it will be seen that the law requires the statement to show the following matters which are omitted therefrom, viz.: "The amount of debt owing by the county." The statement should show the *whole debt*, whereas it only shows the warrant debt, and it appears on the face of the statement that there is a bonded debt, on account of which it shows taxes have been levied to pay the interest. "In what the debts consist." It does not specify the *character* of the debt. "What payments, if any, have been made." This is not shown. "The rate

of interest such debts are drawing." This is omitted. "A detailed account of the receipts and expenditures of the county for the preceding (six) months." This is not shown. The statement deals with the amount of the *tax levy* and not with the *moneys* actually *received*; nor does it show the expenditures definitely. It shows the amount of county warrants canceled, but does not show how or when they were paid; nor whether by cash or in receipt for taxes as authorized by the General Laws, Colo., 1877, pp. 759-60, Sections 2289-2290, and General Stats. of Colo., 1883, Sections 2884 and 2885; nor does the statement show that it relates to the operations of the *preceding six months*. It does not show the *receipt* of any *moneys* whatever, nor from what officers, or on what account they were received, and the amounts, nor to what individuals, nor on what account moneys have been paid out, if any, and the amounts. No balance is struck, showing a deficit, if any, between the receipts and expenditures, that it may be seen what the receipts were, and what the deficit was, if any, or whether or not there *was* a deficit, or an actual balance of moneys in the treasury, if any.

It thus appears *definitely* that the said supposed statement is not *that* contemplated and required by the statute. The statement contemplated by the law is one which states specifically the *moneys* received *in fact* and from whence it came, and the moneys paid out in fact, and to whom. The *whole* debt of the county, and the

deficiency, if any, between the debt itself and the amount collected and paid out, upon such outstanding debt. The statement erroneously deals with the taxes levied, collected, in process of collection and uncollected, instead of with the moneys *actually collected*. The law contemplates an account similar to that usually made out and rendered between natural persons, from which the dealings between the parties can be seen and understood. The statute providing for such statement of account is mandatory. The language is "It *shall be* the duty of the Board of County Commissioners to make," etc., and "such statement *shall show*, the amount of debt owing by the county, in what the debt consists, what payments, if any, have been made upon the same, the rate of interest that such debts are drawing, also a *detailed account* of the *receipts and expenditures* of the county for the preceding (six) months, in which *shall be shown* from what officer and on what account any moneys have been received, and the amounts, and to what individuals and on what account any moneys have been paid out, and the amounts; and *shall strike* the balance, showing the *amount of deficit*, if any, and the *balance* in the treasury, if any." The said law also requires the statement to be published or posted in this language: "At *which time* (the time the same is made) they *shall have such statement published* in some weekly newspaper, published in the county, if there be such published; and if there be no newspaper published in the county, such

Commissioners shall cause such statement to be posted in three conspicuous places in said county, one of which shall be the court house door." And the law further provides that the statement shall be recorded in this language: "And the statement thus made, in *addition* to being published, as *before specified*, shall also be entered of record by the clerk of the Board of County Commissioners, in a book to be by him kept for that purpose only, which book shall be open to the inspection of the public at all times." The words of the statute are "SHALL HAVE SUCH STATEMENT PUBLISHED," etc. Such statement shall show, etc. "In which it *shall* be shown from what office," etc., and "the statement *thus made*, in addition to being published, as before specified, *shall* also be entered of record," etc. Here, then, we have clear, mandatory statutory law prescribing the conditions *precedent* to constituting a semi-annual statement, evidence of the matters therein contained. The statement must not only contain all the statute requires, but it must also be published in a weekly newspaper published in the county or posted, as the case may require, *at the time the same is made*, and the statement *thus made* must also be entered of record by the clerk of the board in a book to be by him kept for that purpose only. All these requirements must be STRICTLY complied with and SHOWN TO EXIST to entitle the statement to be received as evidence of the matters set forth therein, and unless strictly complied with, we have seen that the same must be rejected

as evidence. There was NO PROOF OR OFFER OF PROOF, on the trial below, that the supposed statement in this case was recorded as the law requires, and if there had been such proof, the record would have been unavailing as evidence, for the reason that the statement does not comply with the mandatory law concerning what it SHALL state and contain. The Court below, therefore, erred signally in admitting it in evidence and in giving judgment in accord with the proof it was supposed and permitted to furnish. The publication of the statement was a condition precedent to its record, the language of the law being, "And the statement thus made." As a matter of law and fact a statement is not a statement until it is made as required by the law, and it is not "thus made" until it is made by proper authority and published or posted as the case may require, and hence until it is "thus made" it may not be recorded as provided and operate as notice or evidence of notice to any one, and if recorded without being "thus made" the record is a nullity, as notice or evidence of notice, and no one is affected thereby. In the case of *Sutliff vs. Lake Co.*, 147 U. S., 234, the Court says: "The statute, moreover, * * * made it their (the Board of Commissioners) duty to *publish*, and to cause to be entered on their records, open to the inspection of the public at all times, semi-annual statements, *exhibiting in detail the debts, expenditures and receipts of the county for the preceding six months*, and striking the balance so as to

show the amount of any deficit, and the balance in the treasury."

Here, this Court, in the case cited, construing the very statute under consideration, holds that the statement MUST CONTAIN THAT WHICH WE CLAIM AND CONTENTEND FOR.

The statute necessarily makes the semi-annual statement the PRIMARY and ONLY evidence of the debt outstanding and unpaid when the bonds are issued, because it specially provides for the creation of such evidence, and in effect designates it as the only evidence of the debt of the county to be considered with reference to the bonds; such evidence, therefore, necessarily becomes the only evidence available, of the county's debt, on the principle of *expressio unius est exclusio alterius*. The purchaser of the bonds need look no further for evidence of the outstanding debt and need not look *beyond* the statement provided by the statute for the six months immediately preceding the date of the issuance of the bonds. In the case at bar, that statement was for the six months immediately preceding July 1, A.D. 1880. It stands to reason that unless the specific evidence of debt provided by the statute is extant and available, in accordance with the provisions of the statute itself, the purchaser for value of bonds cannot be affected with notice other than that provided by the statute itself, and that to bring the notice home to such purchaser, the statute must be *strictly pursued* in creating the evidence of such notice. Such evidence is exclusive, by virtue of the

statute providing it, and hence the admission of the warrant registry and clerk's books on the trial of this case below, was signal error. In the case of Sutliff vs. Lake County, cited at page 235 of the report, the Court said: "*But if the statute expressly requires those facts to be made a matter of record, open to the inspection of everyone, there can be no implication that it was intended to leave that matter to be determined and concluded, contrary to the facts so recorded.*" And I add, that there can be no implication that it was intended to leave *that matter* to be determined and concluded in any other manner or by any other evidence than that provided by the statute itself, and the record to be made thereunder, and if there is none, or none such as the statute expressly requires to be made (and we have seen there is none if the statute is not strictly pursued), then the fact of the outstanding indebtedness is open, and not determined as required by law, and the purchaser under no obligation to look further, as he is justified in assuming, in the absence of the required record, that no debt exists other than those of the bonds he is dealing with. Thus this Court holds, in effect, in construing the *very statute* under consideration, that the semi-annual statement and record thereof, provided for, was and is the only evidence of the fact of the debt outstanding, which fact, and the notice resulting therefrom, depended entirely upon the statute and the record made thereunder, the Court saying, in view of the statute and its provis-

ions, "there can be no implication that it was intended to leave that matter (the fact of the outstanding debt and assessed valuation) *to be determined and concluded contrary to the facts so RECORDED.*" Or, in other words, contrary to the mode and manner provided by the statute and the record provided thereby. This Court, in the same case, at pages 236-37-38 of the report, says, quoting from Dixon County vs. Field: "If the fact necessary to the existence of the authority was *by law* to be ascertained, not officially by the officers charged with the execution of the power, but by *reference to some express and definite record of a public character*, then the *true meaning* of the law *would be* that the authority to act at all *depended upon the actual objective existence of the requisite fact*, as SHOWN BY THE RECORD, and *not* upon its ascertainment and determination by anyone." That is to say, by any other mode or manner than that provided by the statute. The Court continues:

"The amount of the assessed value of the taxable property in the county is not stated; but, *ex vi termini*, it was ascertainable in *one way only*, and *that* was by reference to the *assessment itself*, a *public record* equally accessible to all intending purchasers of bonds, as well as to the county officers." * * * "All the world besides must have it from the same source, and for themselves." * * * "The fact, *as it is recorded* in the assessment itself, is intrinsic, and proves itself by inspection and concludes all deter-

minations that contradict it." "In Chaffee County vs. Potter, on the other hand, the bonds contained an express recital that the total amount of the issue did not exceed the constitutional limit, and *did not show* on their face the amount of the issue, and the county records showed *only* the valuation of property, so that, as observed by Mr. Justice Lamar in delivering judgment: 'the purchaser might even know, indeed, it may be admitted that he would be required to know, the assessed valuation of the taxable property of the county, and *yet he could not ascertain by reference* to one of the bonds and the assessment roll whether the county had exceeded its power, under the constitution, in the premises.'" The above doctrine applies rigidly to the supposed record of the outstanding indebtedness, in the case at bar, like the assessment, the indebtedness was ascertainable by reference to an *express* and definite record of a public character, and the true meaning of the law would be, that the limitation of power to act depended upon the *actual objective existence* of the requisite fact as *shown only by the record*, which the law provided to that end, and not upon its ascertainment and determination by any other means, mode or manner. If there is no such record, the whole matter is, so far as the purchaser of the bonds is concerned, absolutely at sea, entitled to no recognition and absolutely beyond the scope of judicial cognizance. As said above, in Dixon County vs. Field, of the assessment, so it must be said of the outstanding debt, *ex vi termini*

it was ascertainable in *one way only*, and that was by reference to the semi-annual statement itself and the record thereof, a public record, equally accessible to all intending purchasers of bonds, etc., all the world besides must have it *from the same* source, if at all, and for themselves. The fact as it is recorded in the record of the statement itself is intrinsic, proves itself by inspection, and concludes all determinations that contradict it. But if, as in this case, there is no record, then in the language of this Court in Chaffee County vs. Potter, the purchaser might even know, indeed it may be admitted that he would be required to know the assessed valuation of the taxable property of the county, and yet he could not ascertain by reference to a *record* of indebtedness made as required by the statutes, and the assessment roll, whether the county had exceeded its power under the constitution in the premises, *as no such record of indebtedness was in existence*. This Court continues in the principal case cited: "The case at bar does not fall within Chaffee County vs. Potter, and cannot be distinguished in principle from Dixon County vs. Field, or from Lake County vs. Graham. The only difference worthy of notice is that in each of these cases the single fact required to be shown by the public record was the valuation of the property of the county, whereas here *two facts* are to be shown, the valuation of the property, and the *amount of the county debt*. But, as *both these facts* are *equally required* by the *statute* to be *entered on*

public record of the county, they are both facts of which all the world is bound to take notice, and as to which, therefore, the county cannot be concluded by any recitals in the bonds." So here, in the case at bar, if there was such record as to *both* of the required facts. But as to the record of indebtedness, we say *nul tie' record*, and such being the fact, the rule of Chaffee County vs. Potter obtains and governs this case as against all other decisions.

The evidence of the debt outstanding by force of the statute admits of no evidence of a *secondary* character, because such secondary evidence of debt, if any, is *de hors* the statute providing for semi-annual statements and their record, and hence is incompetent to bring home notice, or evidence of notice, to the purchaser of the bonds.

The County Government Act of March 24, 1877, which contains the legislation under consideration, was compiled by the first state general assembly from, and contains the various county laws existing and in force under the territorial regime, and was not intended to speak as a new law, the provisions of which were unknown to the people of Colorado. The act simply collects together in a single enactment and continues, the county legislation which already existed in various acts, enacted at various times, by the territorial Legislature. The law cited, relating to semi-annual statements, existed in 1868 (Revised Statutes of Colorado, of 1868, page 172, Sec. 30), in the following form:

"Section 30. The Boards of Commissioners of their respective counties, at their regular meetings, to be held in January and July in each year, shall cause to be prepared a statement of the receipts and expenditures of such county during the six months immediately preceding, setting forth the amount of money received from taxes, from the licenses for the sale of intoxicating liquors, and from the licenses to sell or peddle other merchandise, respectively, and the amount received from all other sources; setting forth also the amount expended, and the particular objects for which, in each case, every sum of money hath been expended; and such statement, signed by the chairman and clerk of the board, shall be published at least one week in some newspaper printed in the county, or if there be none, by posting in three public places in such county."

And prior to the act of 1877, the act of 1868 was supplanted by the act of 1872 (Laws of 1872, pages 78, 79), which is as follows, viz.:

"Section 1. Hereafter it shall be the duty of the County Commissioners of each county to make out statements at the end of each and every three months of each year, that is, on the first of January, April, July and October, at which times it shall be the duty of such County Commissioners to have such statement published in some weekly newspaper, published in the county, if there be such published; and if there be no newspaper published in the county, then copies of such statement shall be

made out, and shall be posted up in the most conspicuous place in each township of the county, by the Sheriff, within two weeks after the statement shall have been made out."

"Section 2. Such statement shall show the amount of debt owing by their counties; in what the debt consists; what payments, if any, have been made upon the same; the rate of interest that such debts are drawing; also a detailed account of the receipts and expenditures of the county for the preceding three months, in which shall be shown from what officer, and on what account any money has been received, and the amounts; and to what individuals and on what account any money has been paid, and the amounts; and shall strike the balance, showing the amount of the deficit, if any, and the balance in the treasury, if any."

"Section 3. The statement thus made, in addition to being published as before specified, shall also be entered of record by the Clerk of the Board of County Commissioners, in a book to be by him kept for that purpose only, which book shall be open to the inspection of the public at all times."

The last act was substantially continued in that of 1877. This was the law of the territory when there was no congressional limitation upon the power of counties in the contraction of indebtedness, as the "Harrison Act" providing such limitation in territories was not passed until July 30, 1886 (Supplement to R. S. U. S., 503 to 505), long after Colorado became a state. So that the pecul-

lar significance given to 457 of the county government act of 1877, as providing a record of indebtedness, of which the purchasers of Colorado county bonds must take notice, is hardly warranted by the history of the law, for, as is seen, it was not designed to convey notice to purchasers of bonds, under a constitutional or other limitation of power to incur indebtedness. The act of 1877, as before stated, originated no new departure on the subjects embraced in the same, but simply embraced and continued therein the law as it stood *prior* thereto, when Colorado was a territory, and the several counties of the state had power to contract or incur debts co-extensive with the laws passed by the territorial Legislature.

In the foregoing argument I do not mean to be understood as contending that if the sum of the entire issue of the bonds, stated on their face to be \$50,000, is in excess of the constitutional limit, the defendant in error could not rely upon the recital of the bonds to show the extent of the issue, and to show that the issue was beyond the constitutional limit if such was the fact. But in this case the following facts appear by the defendant's answer (record, pages 12 and 13), viz.: That the debt limit when the bonds in question were issued, was \$66,758.93; and that the assessed valuation of the defendant county for the year 1880 was \$11,126,489. It also appears by the final action of the defendant county, had September 6, 1880 (record, pages 91, 95), that the bonds in suit were issued on *that day*,

although dated July 31, 1880, the date of such final action, thus fixing the day of the issuance of the bonds and the contraction of the debt of the same, as against the date of the bonds themselves. (Anthony vs. County of Jasper, 101 U. S., 693; Coler vs. Cleburne, 131 U. S., 162, and also Simonton on Municipal Bonds, Section 101, and cases cited.)

Under the recent decision of the Supreme Court of Colorado, in the case of the Board of County Commissioners of Lake County vs. Joseph Standley (MSS. unpublished, dated January 18, 1897), the assessed valuation of 1880 *measures* the power of the defendant county in the contraction of the indebtedness of the bonds in suit. The ultimate limit of power to contract indebtedness at the time the bonds in suit were issued is shown to be \$66,758.93, and the burden resting upon the county to show the invalidity of the bonds, under the decision of the Supreme Court above cited, it was incumbent upon the county to make competent proof of the outstanding indebtedness, the sum of the bonds in suit being \$50,000, and less than the admitted ultimate limitation, by vote, of the power to issue the bonds in question. The ultimate limit being the only one of which the purchaser is bound to take notice, it follows that, although the bonds on their face show the whole issue to be \$50,000, yet the sum of the whole issue is within the ultimate limit of Section 6 of Article XI of the constitution cited.

Counsel for defendant in error on pages 34 to

43 of their brief undertake to avoid the consequences of the failure of the county to evidence, in this case, the amount of the outstanding indebtedness, by semi-annual statement, when the bonds in suit were issued, by showing that as provided in other sections of the statute, records are required to be kept of the various acts of the various officers of the county, which altogether constitute the basis upon which the semi-annual statement rests, and from which it is made, as required by Section 457, cited *supra*. It requires no argument to refute the position of opposing counsel so taken, for the reason that the semi-annual statement provided for by the law is provided as a *summary statement* made up from all the other records of the county existing, being and remaining in the several offices of the county officers, from which the county board is required to make the *summary* provided for in the law of semi-annual statements. It would be absurd to contend that a purchaser would be compelled to delve in the voluminous and musty records of the county, extending over all the years of the county's existence, to ascertain the amount of the county's indebtedness outstanding. Such a task would employ such purchaser to such an extent as to *wholly deter him*, and all others, from purchasing any bonds the county might issue; hence the object of the semi-annual statement was and is to provide a *summary statement* of the records of the county and place it upon record, thus furnishing a summary statement of the conclusions to be derived

from all records of the county, showing the outstanding debt, and the statute having provided for the making and recording of such *summary statement* of *all* the county's financial records, it is apparent that such *summary statement* was INTENDED TO SUPERSEDE and take the place of *all other records*, and necessarily excludes them from consideration, in evidencing the outstanding indebtedness of the county.

III.

The construction of the article of the constitution under consideration, which I desire to urge upon the Court at this time, is presented in the light of the amendment to that section, adopted by the people of the state of Colorado at a general election held in said state on the sixth day of November, A. D. 1888.

That amendment has been adopted *since* the questions which have heretofore arisen under that section of the constitution were adjudicated in the case of *People ex rel. Seeley vs. May, County Treasurer*, 9 Colo., 80 404, and *Lake County vs. Graham*, 130 U. S., 674 684, and to my mind affords a guiding light which upholds our contention which is now made in the case; consequently, there is no antagonism or inconsistency between the present contention and the contentions heretofore made in the arena of the Courts in construing that section of the constitution as it stood prior to such amendment, with reference to the subjects involved in prior litigation.

The indebtedness now under consideration is entirely another and a different indebtedness from that with which the litigation referred to was connected. Here the indebtedness under consideration consists of BUILDING BONDS, with the coupons thereto attached, issued for the purpose of raising money to build a court house for the County of Lake, one of the "favored" purposes mentioned in Section 6 of Article XI of the Constitution of Colorado, and we shall presently see that the obligations issued for those favored purposes are under the protection of the constitution itself and have a *different character* and more *favorable status* than that of the indebtedness of the funding bonds, heretofore considered by the Courts in the cases referred to. In reference to this particular indebtedness, my contention in the construction of the section of the constitution under consideration, as amended November 6, A. D. 1888, is, that, with reference to the indebtedness incurred on account of the favored purposes mentioned in the section, viz.: "Erection of necessary public buildings, making or repairing of public roads or bridges," the constitution makers intended to place *no other* limitation upon the power of counties in the contraction of indebtedness for those purposes than the requirement of a *vote* of the qualified electors of the county, who in the year last preceding such election shall have paid a tax upon property assessed to them in such county. The phraseology of the section is special with reference

to the indebtedness for those favored purposes, whereas it is *general* with reference to all other indebtedness that might come within its provisions. It is plain to my mind *now*, after all that has gone before in the discussion of the meaning of this section of the constitution, that this clause, "*Unless, when in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt,*" clearly authorizes the incurrence of a debt for those favored purposes by the *consent* of the *taxpayers* in a sum *beyond any and all* of the limitations of this section of the constitution, that, in fact, it authorizes the taxpayers to incur a debt in *any amount*, for those favored purposes, that they shall see fit, by a vote, to assent to.

There does not seem to be a limitation here, except by vote, of the power to contract debts in the ordinary manner. The debt having been authorized by a vote may be incurred in the ordinary way and evidenced by the execution and delivery of any obligation to the extent of the sum voted, so it does not amount to the *contraction* of the debt by the *issuance* of bonds.

This language relative to "bonds" plainly shows that the makers of the Constitution understood at this point that they were dealing solely

with debts contracted by the issuance of bonds, because no other manner of contracting was under consideration, and hence the words "so contracted" necessarily means "contracted by the issuance of bonds," for unless contracted by bonds the debt could not be said to be "so contracted" within the meaning of the language here used to designate the subject (bonds) under consideration, and this language as to bonds on the principle of the maxim *expressio unius est exclusio alterius* excludes from the bond limitation contraction through the use of all other forms of indebtedness. We argue this distinction here, to enforce our construction of the use of the words "so contracted," and insist that those words necessarily mean the contraction by bonds *only*, and if we are right in this conclusion, then the other conclusions of our argument are tenable.

The language, as will be seen, immediately following that last above quoted, is as follows: "But the bonds, if any (?) be issued therefor, shall not run less than ten years, and the aggregate amount of *debt SO contracted* shall not at any time exceed twice the rate upon the valuation last herein mentioned." Clearly to my mind the words "*debt SO contracted*" refer to the amount of indebtedness incurred for favored purposes *by the issuance of bonds* upon a vote had, and not to the amount of debt contracted *otherwise* than by the issuance of bonds evidencing the same.

It seems now clear to my mind that the fram-

ers of the constitution intended to allow the taxpayers to create any amount of debt for favored purposes, beyond the amount limited in other parts of the section for general purposes, *provided* the question of incurring the same was submitted to a vote of the taxpayers, and a majority of those voting voted in favor of incurring the debt; the constitution makers intending that such debt might be dealt with by the county board somewhat on the principle of "pay as you go," by the levy of taxes to discharge the same, upon the taxable property of the county, if the county chose to deal with it in that manner *instead* of *by issuing bonds*. In other words, I argue that the *true* construction and spirit of the section, as applied to debts contracted for favored purposes, was and is, as if the framers of the constitution had said: "You, the taxpayers of any county, provided you are willing to pay as you go, by the levy of taxes *instead* of *issuing bonds*, may incur an indebtedness for favored purposes, in any amount which a majority of you voting thereon at an election shall assent to, but you shall not saddle posterity with a *bonded indebtedness* beyond the sum specified in this section." This idea is amply contained in many constitutions of many states of the Union, notably in those of the states of Georgia, California, Idaho and Missouri. The constitutions of those states provide similar limitations upon incurring *bonded* indebtedness. Our constitution provides that a bonded indebtedness for favored pur-

poses, if any be issued therefor (?), shall not run less than ten years, and the aggregate amount so contracted (that is, by bonds for favored purposes) shall not at any time exceed twice the rate upon the valuation last herein mentioned." "BUT THE BONDS, IF ANY BE ISSUED THEREFOR." (?) This is as much as to say a debt may be contracted by vote without the issuance of bonds and dealt with in payment as other ordinary county debts, viz.: by taxation.

I think the framers of the constitution thought it perfectly safe to leave the question of the incurrence of such indebtedness to a vote of the taxpayers, and that when they said in effect to the taxpayers that if they contracted indebtedness beyond the amount specified in the section, they must be prepared to pay it by the levy and collection of taxes upon their property at once, they thought it would operate as a sufficient restraint upon an extravagant or unnecessary appropriation of public funds. These views seem to be sustained by the address submitted by the framers of the constitution to the people on its adoption, a portion of which address is as follows:

"By the provisions of this article we have prohibited the Legislature from lending the credit of the state in aid of any corporation, either by loan, or by becoming a subscriber to any stock, or joint owner with any party, except in case of forfeiture and escheat, and from assuming any debt or liability of any party, and have also required the appropria-

tions to be kept within the limits of our resources, and that no appropriations be made *unless assessments are also made sufficient to meet them, and at the same session of the Legislature.* The SAME PRINCIPLES are applied to counties, cities, towns and school districts as *far as applicable, with an ADDITIONAL SAFEGUARD, that to increase the indebtedness in excess of the RATES FIXED in this constitution a VOTE OF THE PEOPLE must be had thereon.*" (See address, Mills' Ann. Sts., Vol. 1, 102, sub. 206.) All the limitations fixed, are declared off by a vote of the taxpayers. These expressions in this address clearly indicate the understanding of the framers of the constitution, and are quite consistent with the language of the constitution itself. Mark the language "that to increase the indebtedness in *excess* of the *rates fixed*," in other words, the limitations; the ultimate limits fixed by the section. This language clearly implies, first, a "fixed" absolute "rate" or limit, by the section itself; and second, the abolition of the rule absolute by a vote of the taxpayers, and the fixing of the limitation co-extensive with the amount voted by the taxpayers. The language clearly allows the contraction of debts without bonds, without further limitation than by a vote of the taxpayers, and *this being seen* by the general assembly when they formulated the amendment, they acted accordingly, and deeming the debt of the bonds valid declared it "an *indebtedness* outstanding," and addressed themselves *only* to ex-

panding the power to contract *debts by loan by the issuance of bonds to liquidate such indebtedness.*

The Supreme Court of Colorado in the case of *People ex rel. Seeley vs. May, Treasurer*, 9 Colo., 89, says of the address: "IT HAS THE RANK AND CHARACTER OF A STATE PAPER, ISSUED TO THE PEOPLE BY THEIR CHOSEN REPRESENTATIVES IN CONVENTION ASSEMBLED, AT A MOST IMPORTANT PERIOD OF THEIR HISTORY AND UPON QUESTIONS OF THE FIRST MAGNITUDE."

True, the Court in the case cited, in construing the section of the constitution under consideration, held it to be a limitation upon the power to contract the indebtedness involved in that case, which was incurred without a vote of taxpayers, and was a county warrant for \$15.40. to pay a debt not incurred for the purpose of erecting necessary public buildings, or making or repairing public roads or bridges. In the case at bar the indebtedness was incurred by a vote of taxpayers for the purpose of erecting public buildings, viz.: a court house, and hence the case of *People ex rel. Seeley vs. May* is not *stare decisis*. Nor is the case of *Lake County vs. Rollins stare decisis* for the same reason. The case at bar is clearly an exception to those cases.

The indebtedness in the case at bar was contracted prior to the decision of the Supreme Court of Colorado cited, and hence the national courts are not bound to follow the decision of the Supreme Court of Colorado in construing the section of the constitution under consideration.

In such cases the national courts hold that it is their province to determine the law of the case, independent of decisions of the state courts rendered subsequent to the contraction of the indebtedness in suit. *Douglas vs. County of Pike*, 101 U. S., 686; *Gelpecke vs. Dubuque*, 1 Wall., 206; *Burgess vs. Seligman*, 107 U. S., 33; *Greene County vs. Commissioners*, 109 U. S., 104; *Pana vs. Bowler*, 107 U. S., 540; *Carroll Co. vs. Smith*, 111 U. S., 556; *Anderson vs. Santa Anna*, 116 U. S., 356; *Bolles vs. Brimfield*, 120 U. S., 759.

We are not aware that the views herein given of the section of the constitution under consideration have ever been presented to this or any other Court, outside of this case, and they are here presented to the serious consideration of this Court in the light of the *proviso* added by way of amendment to the section, as before stated.

The proviso was considered and adopted by the people November 6, A. D. 1888, and taken in connection with the section as it originally stood, is a significant piece of law enforcing our position in reference to the meaning of the section of the constitution as it originally stood. And I argue that the proviso takes the debts therein mentioned, viz.: Those contracted prior to December 31, 1886, out of the operation of the section of the constitution as it originally stood, and validates, *by treating them as valid*, all such debts, so that at this time, the indebtedness being seen to be valid under the constitutional amendment, cannot be

assailed and overthrown by virtue of anything that precedes the proviso in the section as it now stands. The effect of the proviso is to ratify, confirm and validate the county debts in the case at bar, they being in existence prior to December 31, 1886, and are specially named in the amendment, and that was clearly the intention of the people in adopting the amendment to the section. This purpose appears from the fact that the proviso provides chiefly for the contraction of a debt by loan by the issuance of bonds for the purpose of *liquidating* the indebtedness, that is to say, the indebtedness which existed and was outstanding prior to December 31, 1886. The debt in the contemplation of the makers of the amendment was viewed as valid, and held as such for the purposes of the amendment, and therefore the provisions of the amendment were directed towards the contraction of a debt by loan by the issuance of bonds for the purpose of liquidating such valid indebtedness. From the standpoint of the framers of the amendment, there could be no discrimination between the debts enumerated and outstanding; all from *necessity* had to be recognized and treated as valid, whether any of it was or was not invalid.

The proviso, in dealing, as it does, only with the contraction of an original debt by loan, by the issuance of bonds for the purposes of liquidating such outstanding indebtedness, not dealing in any other manner with the indebtedness referred to, but leaving it in its original status, under the con-

situation, the people in adopting the amendment meant to be understood as construing the section as it originally stood favorable to the contraction of the indebtedness referred to, as we have hereinbefore argued, by a vote only.

The section as it originally stood provided a limitation upon the power of contracting a debt for favored purposes, viz.: by vote of the taxpayers, and also, lastly, provides a limitation upon the amount of the issue of bonds for such purposes; whereas, the proviso deals simply with the bonds to be issued under it, enlarging the power to issue bonds, the makers evidently proceeding upon the assumption that a debt for favored purposes contracted in pursuance of a vote, was valid, without further action, and that all that was necessary was to enlarge the power to issue bonds in liquidation of the same.

We say, then, that in the light of the amendment, the general assembly which framed, and the people who adopted it, have put a construction upon the section of the constitution as it originally stood, which validates the debt of the bonds in controversy, that they intended, in that manner, to declare the said bonds valid, and as an *evidence of such intention*, authorized the issuance of new bonds to loan money to liquidate such valid indebtedness. We argue, then, that in this manner the people have validated the debt of the bonds in controversy, and that, having done so, they have taken such debt out of the limitations of the sec-

tion of the constitution as it originally stood, declaring the limitation, if any, off as to the *issuance of bonds* therefor, to the extent of the indebtedness outstanding prior to December 31, 1886, and given plenary power to the defendant county to properly deal with the same in the right administration of its affairs. The makers evidently appreciated the difficulty and inexpediency of immediate taxation to pay off the debt thus held valid, and so provided a safety valve in the contraction of a debt by loan by the issuance of bonds to liquidate the same, which the county and tax payers could avail themselves of if they so chose.

The language of the first lines of the proviso, viz.: "*which has an indebtedness outstanding*," specifically refers to the bonded indebtedness involved in this action, as such indebtedness was outstanding prior to December 31, 1886, and consists of public building bonds, issued for a favored purpose, viz.: to raise funds to build a court house. The debt of the bonds is thus specifically recognized and characterized as a valid and subsisting indebtedness for the purposes of the provisions of the amendment relative to contracting a *new* and independent debt by loan to liquidate the same. Mark the language used: "May contract a debt by loan by the issuance of bonds for the purpose of liquidating *SUCH INDEBTEDNESS*." The existence of an indebtedness was and is a *CONDITION PRECEDENT* to the contraction of a new debt by loan to liquidate the same under the provisions of the amend-

ment. If an indebtedness did not and does not exist, can or could a loan to liquidate be lawfully made thereunder? If, therefore, the amendment was not intended to, and does not by its adoption, ratify and validate the debts dealt with, then the debts contracted by loan by the issuance of new bonds, under the amendment to liquidate the original debt, possibly would, if the original debt was invalid, also be invalid and voidable under the authority of the cases of *Lake County vs. Rollins*, and *Lake County vs. Graham*, 130 U. S., 662, *et seq.*, and *District Township of Doon vs. Cummins*, 142 U. S., 366.

The amendment provides for no procedure under, or outside of it, by legislation, for validating the indebtedness outstanding prior to December 31, 1886, to liquidate which express authority is conferred to contract a new debt by loan, and the fact that no such procedure is contemplated or provided for, is INDUBITABLE EVIDENCE of the intention of the framers to validate the indebtedness dealt with by the adoption of the amendment, and an unanswerable argument that such indebtedness is validated by the adoption of the amendment itself *ex vi termini*. Unless, therefore, the indebtedness enumerated in the amendment, if any part of it was therefore invalid, was and is ratified and validated by the amendment, the proposal and adoption of the amendment was an idle ceremony, as, in case of non-validation, it utterly fails of its purpose. The only procedure provided for in the amendment is

that relative to the issuance of the bonds to contract a debt by loan to liquidate, such procedure does not contemplate acts thereunder to validate the outstanding indebtedness, nor do the proceedings contemplated validate the same, nor was it intended so to do, nor was the dealing with the same in validation by vote or otherwise, aside from the force of the amendment itself, in view by the framers of the amendment, and if the adoption of the amendment did not *ex vi termini* validate the debt, if the debt was invalid, the same remains invalid, and bonds issued to liquidate the same are voidable, from which it is evident that the language of the amendment, viz.: "which has an indebtedness outstanding," was intended, *ex proprio vigore*, to hold and treat the indebtedness enumerated as valid, and, if so, such indebtedness cannot now be questioned as to its validity in any action or proceeding had to secure payment. The language of the amendment is: "The question of ISSUING SAID BONDS shall, etc., be submitted," etc., not "The question of VALIDATING said INDEBTEDNESS shall be submitted," etc. The procedure provided in the amendment to issue the bonds proceeds upon the assumption that the amendment, when adopted, validated the indebtedness enumerated in the amendment, if invalid, and therefore the amendment only provides procedure for the issuance of the bonds in the event that the County Board concluded to deal with the indebtedness in liquidation in that manner. Suppose the bonds contemplated

by the amendment were voted by the taxpayers, and the County Board refused to issue them for the purposes of liquidation, as contemplated by the amendment, on the ground that the outstanding indebtedness *was invalid*, because in excess of the limitations of the section of the constitution, as it was before it was amended; if the adoption of the amendment does not *ex vi termini* ratify and validate the indebtedness referred to, could the County Board be compelled by *mandamus* to issue the bonds voted to liquidate the indebtedness, if, in fact and law, the indebtedness was invalid for being in excess of the limitations of the section of the constitution as it stood before amendment? *I think not.* So, then, we reach the inevitable result flowing from the situation, if the amendment did not, *eo instanti*, on its adoption, by its own force, ratify and validate the outstanding indebtedness enumerated therein, and dealt with thereby, viz.: THE FAILURE OF THE AMENDMENT TO ACCOMPLISH THE PURPOSE FOR WHICH IT WAS INTENDED. On the other hand, the law in force when the amendment was adopted, providing the procedure for the issuance of the bonds, specifically provides that the bonds shall be issued if voted, the language being, "shall make and issue coupon bonds of the county," etc. (Section 672, General Statutes, 1883, and Section 440, General Laws of 1877, cited). And the amendment to the constitution under consideration also provides that the bonds to be issued thereunder

SHALL BE ISSUED by the County Board, when voted, to loan money to liquidate.

It is thus seen that the amendment expressly provides that the bonds authorized at such election "shall be issued and provision made for their redemption in the same manner as provided in said law," and the section of "said law" cited, expressly provides that the County Commissioners, when authorized by a vote, "shall make and issue coupon bonds of the county," etc. So that the language of the amendment itself, as well as that of the law, providing for effectuating that part of the amendment concerning the issuance of new bonds, expressly provide, that when voted, the bonds shall be issued in accordance with the vote had, thus conclusively demonstrating the clear intention of the framers of the amendment in framing and submitting it to the people for adoption, and that of the people in adopting it, to put the seal of ratification upon the indebtedness as valid, otherwise they would not have made the issuance of the bonds voted under the amendment *compulsory* and provided no procedure for ratification, they would hardly have compelled the counties to liquidate an indebtedness which, after the adoption of the amendment, in their minds was considered invalid; therefore, considering as they did, that the adoption of the amendment validated the indebtedness, they made the issuance of the bonds, after a vote, *compulsory* upon the County Board. Considering the indebtedness validated by the amendment, if

adopted, the framers were chiefly concerned in providing means to remove the limitation upon the power to contract a debt by loan by the issuance of bonds, to liquidate the indebtedness validated, and so *only* provided procedure to issue bonds to liquidate. Nor did the framers mean to confine the effect and operation of the amendment to indebtedness which was *per se* and *ipso facto* valid under the section of the Constitution as it stood prior to amendment, for the reason that such limitation of the amendment would have defeated its clear purpose, viz.: To afford *definite* and certain *relief* from the embarrassments of Colorado County administration, resulting from the decisions of the Courts, construing the provisions of the Constitution under consideration, and thereby relieve the State from the odium of repudiation by COMPELLING payment.

The General Assembly, by employing the word "indebtedness," in naming and designating the subject they were dealing with, meant nothing less than the entire outstanding debt in the forms named, resting solely upon moral obligation or otherwise; for it was undoubtedly considered, that although a part of the indebtedness was probably contracted and incurred without sanction of law, yet substantial benefits had accrued therefrom to the counties, in the form of public buildings, roads and bridges, and by way of aid in county administration, which put them under, *at least*, a moral obligation to pay them in whole or in part, and acting

with that view and to that end, the amendment was formulated, submitted and adopted as we find it, to settle and avoid all further contention and uncertainty concerning the subjects considered, and restore the credit of the State, and it were idle to say that with that purpose in view, validation by force of the adoption of the amendment *ex vi termini* was not intended.

Again, the words "indebtedness outstanding," refer to the body of the whole county debt enumerated without distinction and regardless of its character. The whole, entire debt was in the mind of the legislative assembly when the amendment was formulated. All was viewed and considered in the legislative mind for the purposes of the amendment. In the very nature of things, no discrimination between the debts could have been made, or intended, as the whole debt was to be dealt with, and as such, contemplated as *prima facie*, valid and lawful; so that the words "indebtedness outstanding" of necessity mean all outstanding county evidences of debt in all the forms enumerated. The amendment is an *explicit recognition* as VALID of all *prima facie* forms of indebtedness and obligations of debt enumerated as subjects for its operation. See City of Huron vs. Second Ward Savings Bank, as to significance of the word indebtedness used. The language is general and does not distinguish between the one debt or the other, and hence means all, without exception, outstanding in the forms specified; *prima facie* they were

Ind Rep 272.

and are all debts in a legal sense, and were and must be viewed as such until specifically declared to be otherwise by a Court of competent jurisdiction, and being thus viewed and held in the mind as valid and lawful by the framers of the amendment, provision was made for the "liquidation of such indebtedness." What indebtedness? Why the indebtedness *in mind* enumerated and outstanding, in its various forms, designated and specified; that apparently valid indebtedness outstanding prior to December 31, 1886, about which there has been a discussion, all that indebtedness, questioned and unquestioned, as to its legality, outstanding prior to the date named; that debt, which might be valid or invalid under Section 6 of Article XI of the Constitution, before this amendment, as the same was construed by the Supreme Court; that is, "*the* indebtedness" WE RATIFY and authorize you to borrow money to liquidate, and pay it, and authorize the contraction of a debt "*by loan*" by the issuance of bonds for the purpose of "liquidating *such* INDEBTEDNESS," and make the obligation of the same certain, in such amount as shall be required. There is now, on the submission of the amendment, an uncertainty as to its character and amount, such character and amount are not fixed and ascertained, they might be ascertained by other proceedings in the Courts, which would be expensive, full of delay and against public policy, therefore, *validate* the debt by *adopting* the amendment, by which power is given under it to contract

a debt by loan, by and before the *usual forum* of the people, at a popular election to *liquidate* the same, if desired, thereby avoiding all further embarrassment and ill-repute.

Again, the Legislature, in submitting the amendment, intended to place a limit on its force, and therefore confined its force to indebtedness outstanding December 31, 1886. That fact evidences the purpose to confine the amendment's force to retrospective action and to exclude prospective operation, and the apprehension of that intention affords a view of the further intention, viz.: To continue the section as it was as to contraction of *future debts*, and to obliterate the invalid past by *present validation*. *Ex uno disce omnes*. We thus apprehend and clearly see the purpose of the framers of the amendment to *validate* the *debts enumerated* and outstanding, and stop there, as to all other debts of a like character contracted after December 31, 1886.

The adoption of the amendment was tantamount to declaring that the past was legalized, while the future must remain under the constitution and the law as it was, and is found to be, as to limiting the power of contracting future indebtedness. The act submitting the amendment was passed April 4, 1887, and the amendment was adopted by the people November 6, 1888. Why did the law-making power apply the amendment retrospectively only, and to indebtedness outstanding December 31, 1886; why did they not apply it

to all debts incurred after December 31, 1886? The reason is apparent. The date designated December 31, 1886, was about the date of the last decision of the Colorado Supreme Court, in which that Court finally adhered to its construction of the constitution as enunciated in *People ex rel. Seeley vs. May*, 9 Colo., cited, the original decision having been rendered by Elbert, J., a year before. During the period intervening between the first and last decision, the several counties of the state had followed the rule of the constitution as enunciated by that court, and as a consequence they had ceased to incur debts in excess of the limits of Section 6, Article XI, about December 31, 1886. In the light of events, it was therefore known that all debts which were of doubtful validity were incurred prior to the date named, and hence the restriction to that date discloses the purpose to validate, and that purpose seems to be manifest in the selection of the date named, and by confining the force of the amendment to indebtedness "outstanding" at such date. The word outstanding seems to be chosen by reason of its legal significance. If the expression "indebtedness contracted and unpaid" had been used, a sense of restriction to legal indebtedness might have been inferred, for the reason that an illegal obligation could not be said to have been contracted. The General Assembly, by the use of the word "outstanding," avoided a restrictive sense, and by that word intended all the "indebtedness" extant and named,

valid and invalid, not dealt with in liquidation, unpaid, uncollected: as an outstanding draft, bond, premium, or other demand or indebtedness. (Anderson's Dictionary, 741.)

The amendment is in the form of a *PROVISO*, and as such is intended to *suspend* the *operation* of the section as it *originally* stood upon the *subjects named* in the *proviso*, and thereby excepted from the operation of the section as it originally stood the subjects of the proviso which, but for the proviso, would otherwise be within the same. Sutherland on Statutory Construction, Sec. 222, notes and cases cited, page 294.

The amendment should be construed in the light of the mischief it was designed to remedy: (Cooley Con. Lim., 4th edition, pages 79 and 80) and the mischief was apparent, as witness the uncertain condition of the outstanding county indebtedness as to validity and the general embarrassment in county administration, brought about by the decision of the Supreme Court of Colorado, in *People ex rel. Seeley vs. May*, 9 Colo., 86, 404, 415. The situation was such that the valid could not be distinguished from the invalid, if any, without resort to some proceedings, judicial or otherwise, hence the proposed procedure by amending the constitution, *thereby ratifying all* the outstanding indebtedness enumerated, and relieving the embarrassments of the situation, by authorizing the issuance of *NEW BONDS*, as provided in the amendment, to liquidate the indebtedness validated.

Taxation was available to liquidate it, but that in a majority of cases would have been, and would be, oppressive upon the taxpayers. The relief by raising money by contracting a debt by loan was therefore *necessary*, and hence provided for. The chief concern of the framers of the amendment seemed to be the enlargement of the power under the section of the constitution amended, to contract a debt by loan by the issuance of bonds. They were fully alive to the fact that the section amended provided a limitation upon the power to contract *debts by loan by bonds*, and, desiring to extend such power, commensurate with the debt outstanding, to enable counties to obtain funds to liquidate the indebtedness validated, and which they intended to validate, they provided procedure *only* relative to the issuance of bonds to contract a debt by loan, to liquidate, and conferred such extended power upon the *same conditions* as the original power is conferred to contract debts in the first instance by loan, viz.: *by a vote of the taxpayers*, so that on a vote of the taxpayers, the power to issue bonds to liquidate, to the extent of the outstanding indebtedness validated, was, and is, conferred by the amendment, notwithstanding the fact that in incurring such indebtedness, the limits of the section as it originally stood might have been exceeded, and thus the indebtedness was, and is, held and treated as valid by the amendment, and thus ratified and validated *without any*

further action of any forum or tribunal whatever. That fact seems to be plainly demonstrated.

The fact that the amendment extends the power to contract a debt by loan, to the extent of the outstanding debt enumerated, to liquidate the same, and provides no procedure whatever to validate the debt, is conclusive evidence of an intention and purpose to validate the debt by the adoption of the amendment, on the part of the framers, and an unanswerable argument that such debt is, by consequence of the submission and adoption of the amendment, validated.

I submit that the history of the State contemporaneous with the proposal and adoption of the amendment, of the causes which led to such adoption, and the discussions and issues before the people at the time of the submission of the amendment by the Legislature, as well as at the time of its adoption by the people, are legitimate sources of information as to what was intended by it, and hence as to what significance should be given to it. On turning to the history of the events of those times, we recall a state-wide disputation and discussion of Section 6 of Article XI. of the Constitution, out of which came the cause of *People ex rel. Seeley vs. May*, cited, and other decisions of the Supreme Court of Colorado, construing the section as a GENERAL LIMITATION upon the powers of counties to contract ANY AND ALL indebtedness; also the case of *Rollins vs. Lake Co.*, 34 Fed. Rep., 845, in which Brewer, J., held to the contrary, May 7, 1888.

These decisions fixed by judicial interpretation the meaning of Section 6 of Article XI. of the State Constitution, as it stood before the amendment, which substantially invalidated a portion of the debt of the several counties of the State outstanding. By an act passed April 4, 1887 (Laws of 1887, page 27, Section 2), the General Assembly proposed and submitted to the people of the State the amendment under consideration, and the same was adopted by the people November 6, 1888, at the general election, at which members of the General Assembly were elected. These events, then, fairly show that the amendment proposed was for a SPECIAL and LIMITED PURPOSE. Evidently the amendment was designed to relieve the situation of embarrassment, by validating the indebtedness enumerated, and conferring power on the counties to contract a debt by loan in aid of the liquidation of such indebtedness. The true status of the indebtedness as to validity or invalidity was unknown, in view of the decisions of the Courts, in the cases referred to. Here, then, was a reason and cause for the adoption of the amendment, and when this purpose is discerned, the amendment will be construed to accomplish the purpose rather than to defeat it.

The construction of a statute should always be such as, if possible, not to lead to injustice or absurd consequences, and infringe as little as possible on the existing rights of individuals. Or, as the rule was expressed by this Court in *United States*

vs. Kirby, 7 Wall., 486, "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always be presumed that the Legislature included exceptions to its language which would *avoid results of this character*. United States vs. Fisher, 2 Cranch, 358; Chinese Merchant Case, 13 Fed. Rep., 605; Southern Pacific Railroad vs. Orton, 32 Fed. Rep., 457, 477; Springfield vs. Edwards, 84 Illinois, 626."

In Lake County vs. Rollins, 130 U. S., 670, 671, this Court said: "To get at the thought or meaning expressed in a STATUTE, a CONTRACT or CONSTITUTION, the first resort, in all cases, is to the natural significance of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of any other parts of the instrument, then that meaning apparent on the face of the instrument must be accepted, and neither the Courts nor the Legislature have the right to add to or take from it. Newell vs. People, 7 N. Y., 9, 97; Hills vs. Chicago, 60 Illinois, 86; Denn vs. Reid, 30 Pet., 524; Leonard vs. Wiseman, 31 Maryland, 201, 204; People vs. Potter, 47 N. Y., 375; Cooley, Const. Lim., 57; Story on Const., Sec. 400; Beardstown vs. Virginia, 76 Illinois, 34. So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the Legislature

should be intended to mean what they have plainly expressed, and consequently no room is left for construction. *United States vs. Fisher*, 2 Cranch, 358, 399; *Daggett vs. Florida Railroad*, 99 U. S., 72."

"There is even stronger reason for adhering to this rule in the case of a constitution than in that of a statute, since the latter is passed by a deliberative body of small numbers, a large portion of whose members are more or less conversant with the niceties of construction and discrimination, and fuller opportunity exists for attention and revision of such a character, while constitutions, although framed by conventions, are yet created by the votes of the entire body of electors of a state, the most of whom are little disposed, even if they are able, to engage in such refinements. The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption."

This is peculiarly applicable here, as the amendment, by its own language and terms, denominates and characterizes the outstanding obligations enumerated as "AN INDEBTEDNESS," and the people in adopting it must therefore be taken to have meant exactly what the amendment plainly expresses, and I submit that the simplest, most sensible and most obvious interpretation of the language used, is that thereby, on its adoption, the outstanding indebtedness enumerated was and is validated, and that such was the intention. Otherwise the most absurd consequences would result. [Thus this national

Court of last resort substantially holds that the mode and manner of construing a statute, a contract or a *constitution*, are the same, as well as the principles of such construction. And in view of this doctrine, and the fact that the Proviso under consideration is curative and remedial, and should be liberally and beneficially construed, I desire to cite the authorities enunciating the principles by which the construction of such enactments should be governed. (a) It is the rule that remedial statutes are to be liberally construed to suppress the evil and advance the remedy: Sutherland on Statutory Construction, Sec. 207, page 274 and cases cited in note 1. (b) A remedial statute, not clear as to any supposed application, admits of a resort to many rules of construction to determine what the Courts are authorized to assume as the meaning and intention of the law-maker. *Id.*, Section 347, note 4. (c) Remedial statutes are such as the name implies, embracing a great variety in detail; those enacted to afford a remedy, or to improve and facilitate remedies existing for the enforcement of rights and the redress of injuries; also those intended for the correction of defects, mistakes and omissions in the civil institutions and administrative polity of the State. *Id.*, Section 207. (d) In the modern sense, remedial statutes not only include those which so remedy defects in the common law, but defects in civil procedure generally, embracing not only common law, but also the statutory law. They are in a general

sense remedial, whether they correct defects in the declaratory, directory or remedial parts. There are also three points to be considered in the construction of all remedial statutes—the law, the mischief and the remedy; that is, how the law stood at the making of the act, the mischief for which the law did not adequately provide, and the remedy the Legislature has supplied to cure this *mischief*. And it is the duty of Judges so to construe the act as to suppress the mischief and advance the remedy. *Id.*, Section 400; Cooley's Blackstone's Commentaries, 86 and 87. (c) The law of remedial statutes may be extended to and include cases clearly within the mischief they were intended to remedy. *Id.*, Section 410. A remedial statute must be construed liberally and beneficially, so as to suppress the mischief and advance the remedy, and if the words are not *clear* and *precise*, such construction *will be* adopted as shall appear the most reasonable and the best suited to accomplish its object; THE CONSTRUCTION WHICH WOULD LEAD TO AN ABSURDITY WILL BE REJECTED, and generally, it may be affirmed that if a statute may be liberally construed, *everything* is to be done in advancement of the *remedy*, or the *intention*, that can be done consistently with any construction that can be put upon it. *Id.*, Section 410, note 5 and cases cited. The substance of the act is principally regarded, and the letter is *not too closely* adhered to; *Id.*, Section 410, note 6 and cases cited. (f) The Courts construe remedial statutes most liberally to effect-

uate the remedy; *Id.*, Section 411, note 9 and cases cited. The Courts follow the reason and spirit of such statutes, until they *overtake* and *destroy* the *mischief*, which the statute was intended to suppress; *Id.*, Section 411, note 2 and cases cited. In doing so, they often go *quite beyond the letter* of the statutes; *Id.*, note 3 and cases cited. What is within the INTENTION is within the statute, although not within the letter; and what is within the LETTER, and not within the INTENTION, is not within the statute; *Id.*, note 4 and cases cited. (g) The intention is not something evidenced *dehors* the statute; it is to be learned from it, with those extrinsic aids to a correct interpretation to which resort may be had; and that intention, when satisfactorily ascertained, is the *design* to which the letter is subordinated. A liberal construction is given to remedial statutes, and statutes generally enacted for the *public convenience* and for its material welfare; *Id.*, Section 412, note 5 and cases cited. (h) Statutes are remedial which are intended to *promote the convenience of suitors*; *Id.*, Section 437, note 4 and cases cited. So are statutes to improve the procedure for obtaining LEGAL REDRESS; *Id.*, note 5 and cases cited. (i) Remedial statutes may be applied to past transactions or pending cases; *Id.*, Section 483, note 5 and cases cited. A remedy may provide for existing rights and *new remedies*, added or substituted for those which exist; *Id.*, Section 482, note 4 and cases cited. As a general rule, a remedial statute may be applied to past

transactions and pending cases, according to the indications of the legislative intention, and this may be greatly influenced by considerations of convenience, reasonableness and justice; *Id.*, note 1 and cases cited. (j) The Legislature has power to pass curing acts which do not impair the obligation of contracts, nor interfere with vested rights; *Id.*, Section 483, note 2 and cases cited. They are remedial by *curing defects* and *adding to the means of enforcing existing obligations*; *Id.*, Section 483, note 3 and cases cited. The rule in regard to curative statutes is, that if the thing omitted or failed to be done, and which consists of defects sought to be remedied or made harmless, is something which the Legislature might have dispensed with by a previous statute, it may do so by a subsequent one; if the irregularity consists in doing something, or doing it in a mode which the Legislature might have made immaterial by a prior law, it may do so by a subsequent one; *Id.*, Section 483, note 4 and cases cited. On this principle the Legislature may validate contracts made *ultra vires* by a municipal corporation; *Id.*, note 5 and cases cited. It may thus ratify a contract with a municipal corporation for a public purpose. Municipal corporations are agents of the state, through which the sovereign power acts in all matters of social concern. It may confer upon them, subject to such constitutional restraints as exist, power to enter into contracts, and annex such limitations and conditions to its exercise as, in its discretion, it deems proper for

the protection of public interests. (k) The right to *limit* involves the power to *dispense with limitations*; and in such cases as the Legislature could have authorized a contract, without previous advertisement or competitive bidding, it may affirm a contract made, although made originally without authority of law; Id., Section 483, note 1 and cases cited. (l) The Legislature may establish defective assessments of taxes, and municipal ordinances irregularly adopted; Id., Section 483, notes 6 and 7 and cases cited. *Where defects are relied on as an excuse for repudiating contracts, executory or executed, they are not within the protection of the constitution*; Id., Section 484, note 1 and cases cited.

These doctrines, enunciated by Mr. Sutherland in his able work cited, are elemental and entirely familiar to this Court. The whole subject of liberal construction is ably discussed, and the authorities in support thereof fully cited, in Chapter XV of the work of said author, beginning with page 521 and ending with page 572, the sections being 408 to 445, inclusive.

It seems to us that these doctrines are entirely applicable to the construction of the amendment of the Constitution under consideration. Such amendment was intended to remedy the evils of the situation in county affairs at the time of its submission to, and adoption by, the people of Colorado, and it is the duty of the Courts to construe the enactment provided to remedy the evils of the situation, *liberally*, for the purpose of reaching, overtak-

ing and remedying the evils of such situation. It was the intention to ratify the outstanding debt enumerated in the amendment and, placing its validity beyond question, provides means for successfully dealing with the same in payment. *It would have been idle to have left the question of ratification of the debt to the subordinate county tribunal and the taxpayers of the county, as in that event the evils in view would not have been certainly overtaken and remedied, because the whims, indisposition and prejudice of the taxpayers would have defeated ratification and payment in all cases, especially so in the case of the defendant County of Lake.* Validation of the indebtedness being accomplished by the adoption of the amendment *ex vi termini*, it was proper to leave the power to issue bonds in payment with the taxpayer to relieve himself thereby if he so chose.

Validation by ratification is not required to be shown by a single special, definite and specific act. It may be inferred or presumed from sundry acts, and from the course of dealing with the subject matter claimed to be validated. *Simonton on Municipal Bonds*, Sec. 247, and cases cited in note 1. In this case the forum of the people, which passed upon and adopted the amendment, was in the same position as to power as a legislative Assembly, in authorizing governmental corporations to contract debts within the limits of legislative power. Where a governmental corporation has no authority to contract an indebtedness, such contraction being

ultra vires, the Legislature may ratify the same without limit, unless restrained by a constitution, and if limited by a constitution, may ratify the same within such limits: *Bolles vs. Brumfield*, 120 U. S., 739; *Granada Co. vs. Brodgen*, 112 U. S., 261; *Simonton on Municipal Bonds*, Sec. 247, cited.

The unauthorized acts of public officers may be ratified, either by some express act of the corporation or by the subsequent course of dealing of the corporation, relative to the unauthorized act, from which the ratification will be presumed; as, for instance, retaining the proceeds of the act, or acquiescing in it by the payment of interest on a part of the principal of the unauthorized debt. *Supervisors vs. Schenk*, 5 Wall. 772-781. Such ratification may be by express consent or by acts and conduct inconsistent with any other hypothesis than that of approval. *Simonton on Municipal Bonds*, Sec. 247.

The doctrine of these authorities is applicable to the case at bar, for the reason that the amendment to the constitution under consideration denominates and deals with the outstanding indebtedness enumerated, as a VALID INDEBTEDNESS, and the course of dealing therewith, as provided in the amendment, *of necessity* assigns the indebtedness to a position of validity; such course of dealing with the same in payment, as provided in the amendment, being inconsistent with any other hypothesis than that the people intended to, and did, approve the indebtedness as valid when they voted

upon its adoption, having in view the entire situation and all the facts and circumstances surrounding its adoption; fully comprehending and knowing that by such adoption they ratified the indebtedness and authorized its payment in the manner provided for in the amendment.

Again, it is true, original loans may not be made to pay the debt without a vote, but the debts are nevertheless validated by the amendment, and the fact that the General Assembly, in formulating the amendment, provided for a vote, *not upon the validation of the debts*, but upon a new debt by loan of money to pay them, evidences the intention to, at all events, validate *by adopting* the amendment, and to refer only the question of loaning money to pay to the voters. If it was not considered that the adoption of the amendment validated the debts, provision would have been made for validation proceedings, as procedure for loans to liquidate invalid debts would not have been provided, and it therefore follows that the fact that proceedings were and are provided to loan money to pay the debts outstanding December 31, 1886, the debts were intended to be, and hence are, ratified and validated *by the adoption of the amendment, ex vi termini*. The greater part of the debts outstanding on the date named were valid, which the General Assembly knew, but, making no discrimination, they treated and viewed *all as valid*, and intended to and did *ratify all*, and, thus ratifying,

provided for their payment by loan proceedings, and the people voted accordingly.

The procedure provided in the amendment is for the contraction of original debts by loan to liquidate, separate and distinct from the debts to be paid off, and such procedure does not, by itself, necessarily validate the debts to be dealt with in liquidation; hence, if the indebtedness being dealt with in liquidation is not validated by the adoption of the amendment, TAXPAYERS may, by appropriate actions in Court, prevent the contraction of debts by loan to liquidate the debts being dealt with, if they are invalid under the constitution as it stood before amendment, and so control all contemplated loan proceedings had to liquidate, as to confine them to debts valid under Section 6 of Article XI, as it was before amendment. Such a situation would defeat the evident purpose of the General Assembly in formulating and submitting the amendment, as well as that of the people in adopting it. No such result was intended, and it follows, as a consequence, that it was the intention of the General Assembly, and the people, to validate *all debts* enumerated, outstanding December 31, 1886, by the adoption of the amendment, and having validated the same, to confer plenary power to liquidate such debts through contraction of NEW and ORIGINAL debts by loan, by the issuance and sale of negotiable bonds to raise the necessary funds to liquidate. If the amendment does not, *per se*, ratify all the debts enumerated by it, as

valid, and only debts valid under the section amended as it stood prior to amendment are enforceable, then the submission and adoption of the amendment was an idle and useless ceremony, as all valid debts were fundable and payable under the funding statute and required no amendment of the constitution to enable counties to deal with them in payment.

I desire to say in conclusion that we rely in this case upon all of the assignments of error, made below, numbered from 1 to 46, inclusive. Numbers 3 to 16, inclusive, and numbers 17, 19, 20 and 21 cover the objections made by plaintiff to the testimony of Mr. J. W. Newell, County Clerk, relative to the outstanding indebtedness (see record, 63 to 70, for testimony) and objections which were overruled by the Court below and severally excepted to by plaintiff, the assignments being on pages 117, 118 and 119 of the record. Assignments 29, 30 and 31 cover the questions propounded to witness Parks, which were objected to by defendant, objections sustained and severally excepted to by the plaintiff (for testimony offered, etc., see record, 31-107). Assignment 24 is upon the receipt of the Warrant Registry as evidence, over the objections of the plaintiff, duly excepted to (for registry, see original record, 123; summary printed record, 74). Assignment 25 is upon the question of the receipt of the County Clerk's books in evidence, which receipt was objected to by plaintiff and overruled by the Court, and excepted to by

plaintiff (for evidence, see record, 70-73). Assignment 26 is upon the receipt of the supposed semi-annual statement in evidence, which was objected to by plaintiff, objection overruled by the Court and ruling duly excepted to (see record, 99 to 103, for statement). Assignment 27 is upon the receipt of the proceedings of the Board of County Commissioners as evidence (record, 104, 105 and 106), which was objected to by plaintiff, objection overruled by the Court, proceedings received and excepted to by plaintiff. Assignment 28 is upon the receipt in evidence of the Bond Registry, which was objected to by the plaintiff, objection overruled by the Court and exception reserved to the ruling. Assignment 32 is upon the offer of proof of the testimony of witness Parks, which was objected to by defendant, objection sustained, and exception to ruling reserved by the plaintiff. Assignment 33 is upon the offer of plaintiff in evidence of the order of the defendant board as shown at pages 124 to 129 of the record.

The order made by the defendant county board, October 18, 1886, as a result of the taking and stating by defendant of the outstanding county debt then existing, shows by comparison with the warrant registry, received in evidence by the Court below, that of the supposed debts enumerated in the warrant registry, only \$14,492.67 were valid and unpaid when the bonds in suit were issued. The defendant county had the account of the outstanding debt taken at my dictation and under my

supervision, with the result stated. I drew this order of the board and had it adopted and put on record, for the very purpose of making a record of the lawful outstanding debt, and providing for its payment. The general account taken and stated was made upon similar principles, concerning the time when the annual assessment took effect, to those enunciated in the recent case in the Colorado Supreme Court of Board vs. Standley, and the order of the board was made as a result of such account. If the account taken was and is correct (and I happen to know it is), then the order shows the valid warrant debt as outstanding and enumerated in the warrant registry when the bonds in suit were issued, and, as a consequence, shows that such debt, with that of the bonds in suit *added*, was, and is, *within the constitutional limit* (see summary, bottom of page 128 of record). Here, on the *county's own showing*, by its *own record*, required to be kept, it appears the bonds were *prima facie* valid. The Court below, therefore, erred in rejecting the evidence. The order of the defendant board will be found at pages 295 to 311 of original transcript of record, and its substance as compared with the Warrant Registry at pages 125 to 129 of the printed record. Assignments 35, 36, 37, 38, 39 a, 39 b, 40 and 36, are upon refusals of the Court below to instruct the jury as requested by the plaintiff in error. We rely upon each and all of these assignments, especially the 36th, record, 130, which is made on the Court's refusal to instruct as

asked, which instruction involves the question of *validation of the outstanding indebtedness by the adoption of the constitutional amendment under consideration in this case.* Assignment 42 is upon the instruction of the Court to the jury to render a verdict in favor of the defendant. Assignment 43 is upon the entry of judgment on the verdict of the Court. Assignment 44 is upon the ruling of the Court on the motion made by the plaintiff to set aside the verdict and for a new trial. The motion for a new trial is fully set forth in the record, as well as the proceedings thereon.

All these assignments are *severally* relied upon to affirm the judgment of the Court below and are here repeated as arguments for such affirmation, and while we have not directed our printed arguments specially to any particular assignment, we have had in view each and all of the assignments, and desire such argument to be considered as directed to each assignment severally, as well as to all collectively. During my conduct of the affairs of the defendant county as an attorney, it was the policy and purpose of the county to pay its outstanding Court House bonds, because a fairly good court house was had and possessed as a result of the expenditure. The court house bondholders were asked to await the result of the other litigation, before dealing with their bonds in payment. They accordingly waited. A new set of officers came into office and the old understanding was repudiated. This action is the result.

From a full consideration of all the matters involved in this case, we submit that the judgment of the Court below should be affirmed and the trial Court below ordered to enter a judgment for the plaintiff for the sum of money claimed and shown to be due him in the case as it stands below.

Not being able to be present at the oral argument of this cause, I avail myself of this mode of expressing my individual views and arguments.

DANIEL E. PARKS,

Attorney for Relator.

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FILED
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JAMES H. MCKENNEY,
Clerk.

*John F. Dillon, Hubbard
Dillon v Richardson for Resp
Supreme Court of the United States.*

OCTOBER TERM, 1898.

Filed Dec. 15, 1898.

No. 177.

THE BOARD OF COUNTY COMMISSIONERS OF
THE COUNTY OF LAKE, COLORADO, PETITIONER,

vs.

HARRY H. DUDLEY.

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR HARRY H. DUDLEY.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
EDMUND F. RICHARDSON, *Counsel.*

IN THE
Supreme Court of the United States.
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WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUPPLEMENTAL BRIEF.

In addition to the matters stated in our main brief, we respectfully submit the following summary of our argument which shows that the circuit court erred in the admission of evidence and in directing a verdict for the defendant.

“**County Clerk's Account Book**” is not the **Record** required by section 30, act of March 24, 1877.

Bryan, counsel for county, says this is *not the semi-annual statement book* (*Record*, p. 64; our Brief, p. 40).

So does **Newell**, county clerk (Record, p. 69).

So the extract itself shows (Record, p. 70.)

Therefore this is not the *record* prescribed by section 30, act of March 24, 1877.

2. *The extract from the county clerk's ordinary account book here offered does not contain the things required by section 30, act of March 24, 1877.* (See section 30, our Brief, p. 55, and compare with the extract from account book, Record, pp. 70-73.)

3. *This account was not made by the County Commissioners.*

(a.) Does not *purport* to be made by them, but by clerk.

(b.) No proof it was made by the commissioners.

(c.) The statement which was taken from a newspaper (which also was *not recorded*), and which was put in evidence as *Exhibit 29* (Record, p. 99), was the statement, if any, which was made by the commissioners. As that statement is *not the same as the extract* from the County Clerk's Account Book, they cannot both be *the statement made by the commissioners*.

4. *This account does not show anything but the clerk's side of the account.* Warrants are drawn by the clerk on the treasurer. This account does not show how much money the treasurer had on hand to pay warrants or what had actually been paid by the treasurer. In short, this showed only one side of an account and proved nothing as to amount of debt, because it did not show treasurer's account.

5. *This account does not show even the clerk's side of the account on the dates when the bonds were issued.*

II. Warrant Register (Record, pp. 73-'4).

1. This, too, is the county clerk's book, and *shows only the "issuance"* of warrants. Mr. Bryant, counsel for county, stated this when he offered it in evidence (Record, p. 73). Does not show how much money the treasurer has to pay them, or how many are actually paid by the treasurer.

To introduce this warrant register in evidence as showing the debt of the county is like introducing in evidence the **stubs** of a man's ordinary check book in order thereby to prove the debts owed by him. Neither the warrant register nor the stubs of a check book prove anything as to how much the debt is on the warrants or on the checks. To ascertain that fact you must go much further, and prove how much *money is in the hands of the county treasurer to pay the county warrants* and how many are actually paid, or how much money is in the bank to pay the man's checks and how many are actually paid.

III. The statement published in the newspaper (Record, pp. 99-103).

1. *Not a part of the records of the county.*

No pretense, even, that this is a part of records of county. It is merely a clipping from an *extinct* Leadville newspaper. Must a *bona fide* purchaser of bonds in Washington or New York or Boston notice the files (if there be any) of an extinct newspaper? Where shall he look for them?

See *Coloma vs. Eaves*, our Brief, p. 27.

2. *This statement is made as of January 1, 1880, many months before any of the bonds in question were issued, and proves nothing as to the amount of debt of the county when the bonds were issued.*

IV. Even if a statement were kept fully and exactly as required by section 30 of the act of March 24, 1877, still it would not constitute a record showing facts as to indebtedness of county sufficient to enable one to determine whether the constitutional debt limit had been reached.

1. Such statement would not show, nor does section 30 require it to show, *what debt was incurred before the adoption of the constitution*, all of which is excepted by the constitution in determining whether the debt limit is exceeded.

2. Nor does section 30 require the statement to show what debt was incurred before the \$1,000,000 valuation is reached; all of which is valid, even if it exceed the rates of \$6 or \$12 on the \$1,000.

JOHN F. DILLON,

HARRY HUBBARD,

JOHN M. DILLON,

EDMUND F. RICHARDSON, *Counsel.*

LAKE COUNTY COMMISSIONERS *v.* DUDLEY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH
CIRCUIT.

No. 177. Argued December 14, 15, 1898. — Decided February 20, 1899.

The instruments sued on in this case being payable to bearer, and having been made by a corporation, are expressly excepted by the Judiciary Act of August 13, 1888, c. 866, from the general rule prescribed in it that an assignee or subsequent holder of a promissory note or chose in action could not sue in a Circuit or District Court of the United States, unless his assignor or transferrer could have sued in such court.

From the evidence of Dudley himself, the plaintiff below, it is clear that he does not own any of the coupons sued on, and that his name is being used with his own consent, to give jurisdiction to the Circuit Court to render judgment for persons who could not have invoked the jurisdiction of a Federal court, and the trial court, on its own motion, should have dismissed the case, without considering the merits.

THE case is stated in the opinion.

Mr. George R. Elder for the Lake County Commissioners.
Mr. C. S. Thomas, Mr. W. H. Bryant and *Mr. H. H. Lee*
were on his brief.

Mr. John F. Dillon and *Mr. Edmund F. Richardson* for
Dudley. *Mr. Harry Hubbard* and *Mr. John M. Dillon*

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were on their brief. *Mr. Daniel E. Parks* filed a brief for Dudley.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought in the Circuit Court of the United States for the District of Colorado by the defendant in error Dudley, a citizen of New Hampshire, against the plaintiff in error the Board of County Commissioners of the County of Lake, Colorado, a governmental corporation organized under the laws of that State. Its object was to recover the amount of certain coupons of bonds issued by that corporation under date of July 31, 1880, and of which coupons the plaintiff claimed to be the owner and holder.

Each bond recites that it is "one of a series of fifty thousand dollars, which the Board of County Commissioners of said county have issued for the purpose of erecting necessary public buildings, by virtue of and in compliance with a vote of a majority of the qualified voters of said county, at an election duly held on the 7th day of October, A.D. 1879, and under and by virtue of and in compliance with an act of the general assembly of the State of Colorado, entitled 'An act concerning counties, county officers and county government, and repealing laws on these subjects,' approved March 24, A.D. 1877, and it is hereby certified that all the provisions of said act have been fully complied with by the proper officers in the issuing of this bond."

The Board of County Commissioners by their answer put the plaintiff on proof of his cause of action and made separate defences upon the following grounds: 1. That the bonds to which the coupons were attached were issued in violation of section six, article eleven of the constitution of Colorado and the laws enacted in pursuance thereof. 2. That the aggregate amount of debts which the county of Lake was permitted by law to incur at the date of said bonds, as well as when they were in fact issued, had been reached and exceeded. 3. That the plaintiff's cause of action, if any he ever had, upon certain named coupons in suit, was barred by

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the statute of limitations. 4. That when the question of incurring liability for the erection of necessary public buildings was submitted to popular vote, the county had already contracted debts or obligations in excess of the amount allowed by law.

One of the questions arising on the record is whether Dudley had any such interest in the coupons in suit as entitled him to maintain this suit. The evidence on this point will be found in the margin.¹

¹ At the trial George W. Wright was introduced as a witness on behalf of the plaintiff. He stated at the outset that Dudley was the owner of the bonds, but his examination showed that he had really no knowledge on the subject, and that his statement was based only upon inference and hearsay. In connection with his testimony certain transfers or bills of sale to Dudley of bonds of the above issue of \$50,000 were introduced in evidence as follows: One dated December 5, 1888, purporting to be "for value received" by Susan F. Jones, executrix of the estate of Walter H. Jones, deceased, of bonds Nos. 55 to 64, both inclusive, and Nos. 65 and 66; one dated February 11, 1885, by David Creary, Jr., J. H. Jagger, Henry D. Hawley and L. C. Hubbard, all of Connecticut, for bonds Nos. 80, 81 and 82, and Nos. 83 to 86, both inclusive, the consideration recited being \$5380.56, "paid by Harry H. Dudley of Concord" in the county of Merrimac and State of New Hampshire; one dated March 20, 1885, by the Nashua Savings Bank of Nashua, New Hampshire, for twenty bonds, Nos. 92 to 111, both inclusive, the consideration recited being \$11,869.45, "paid by Harry H. Dudley of Concord," New Hampshire; one dated March 20, 1885, by the Union Five Cents Saving Bank of Exeter, New Hampshire, of bonds Nos. 112 to 129, both inclusive, the consideration recited being \$10,695, "paid by Harry H. Dudley of Concord," New Hampshire; one, undated, by Susan F. Jones, "for value received," of bonds Nos. 55 to 64, both inclusive, and Nos. 65 and 66, together with coupons falling due in 1884 of bonds Nos. 55 to 60, both inclusive; and one dated December 10, 1884, by Joseph Stanley of Colorado of twelve bonds, Nos. 68 to 79, both inclusive, and six bonds, numbered 67 and 87 to 91, both inclusive, the consideration recited being \$15,887.50, "paid by Harry H. Dudley of Concord," New Hampshire.

Here were transactions which if genuine indicated the actual payment by Dudley in 1882 and 1884 on his purchase of bonds of many thousand dollars.

Dudley's deposition was taken twice; first on written interrogatories, January 14, 1895, and afterwards, March 2, 1895, on oral examination.

In his first deposition Dudley was asked whether he owned any bonds issued by Lake County, and he answered: "Yes, I own certain Lake County bonds which I hold under written bills of sale transferred to me from several different parties." Being asked whether he owned any bonds of Lake

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At the close of the plaintiff's evidence in chief the defendant asked for a peremptory instruction in its behalf, but this request was denied at that time. When the entire evidence

County, Colorado, numbered 92 to 111 inclusive, 83 to 86 inclusive, 55 to 64 inclusive; 68 to 79 inclusive, 80 to 82 inclusive, 65, 66 and 67, and 87 to 91 inclusive, he answered: "I own, under the aforesaid bills of sale, bonds mentioned in Interrogatory 3." He was then asked (Interrogatory 4) if in answer to the preceding interrogatory he said that he owned any of said bonds or the coupons cut therefrom, to state when he purchased the same, from whom he purchased them, and what consideration he paid therefor. In his answer he referred to each of the above mentioned bills of sale, and said that he owned the bonds described in it *by virtue of* such instruments. He did not say that he paid the recited consideration, but contented himself with stating what was the consideration named in the bill of sale. Being asked (Interrogatory 5), "If you are not the owner of said bonds, or any coupons cut therefrom, please state what, if any, interest you have in the same," he answered: "I have stated my interest in the bonds in my answer to Interrogatory 4." He was asked (Interrogatory 9), "If you say you authorized suit to be commenced in your name, please state under what circumstances you authorized it to be brought, and whether or not the bonds or coupons upon which it was to be brought were your own individual property, or were to be transferred to you simply for the purpose of bringing said suit." His answer was: "I understand said bonds and coupons were transferred to me, as aforesaid, for the purpose of bringing suit against the county to make them pay the honest debts of the county."

It should be stated that before the witness appeared before the commissioner who took his deposition upon interrogatories, he prepared his answers to the interrogatories with the aid of counsel, and read his answers so prepared when he came before the commissioner.

When Dudley gave his second deposition his attention was called to his answer to Interrogatory 4, in his first deposition, in relation to the bill of sale running to him from Craig [Creary], Jagger, Hawley and Hubbard. We make the following extract from his last deposition, giving questions and answers as the only way in which to show what the witness intended to say and what he intended to avoid saying: "Q. You also say in the answer to which I have referred, that the consideration in the said bill of sale was \$5380.56. Did you pay that consideration for the bonds mentioned in the bill of sale? A. No, I did not. Q. Did you pay any part of it? A. No, sir. Q. Why was that bill of sale made to you, Mr. Dudley? A. I think I have answered that in some interrogatory here, my answer to Interrogatory 9 in the deposition I gave before in this case. Q. Are not the bonds mentioned in the said bill of sale, together with the coupons, still owned in fact by the grantors named in said bill of sale? A. Not as I understand the bill of sale. I understand I am absolute owner. Q. Was not that bill of sale made to you for the purpose of enabling you to prose-

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on both sides was concluded, the defendant renewed its request for a peremptory instruction, and the plaintiff asked a like instruction in his favor. The plaintiff's request was denied,

cute this claim upon them? A. My answer to Interrogatory 9 in my former deposition answers that also. Q. I repeat the question and ask for a categorical answer. A. I cannot more fully answer the question than I have in answer to Interrogatory 9, former deposition. Q. Do you decline to answer it, yes or no? A. I think this answer is sufficient. Q. If you are successful in the suit brought upon the coupons heretofore attached to the bonds mentioned in said bill of sale, do you not intend to pay the amount of those coupons so recovered to the grantors in said bill of sale, less any legitimate expenses attendant upon the prosecution of this case? A. Yes, my understanding in the matter would be something might be paid them. Q. Is there something to be paid them different from the amount involved in the suit represented by the coupons cut from said bonds? A. I should think there was. Q. In what respect is the difference? A. They would not be paid the full amount. Q. What deduction would you make? A. I do not know just what deduction would be made. Q. When you took this bill of sale, did you execute some sort of a written statement back to the grantors of said bill of sale? A. No, sir. Q. Did you make a verbal agreement at the time with them or any of them? A. No, sir. Q. Were you present when the bill of sale was drawn? A. No, sir. Q. Where was it drawn? A. My impression is that it was drawn at Hartford, Conn., this particular one that you refer to. Q. Yes. Who represented you at the drawing of the bill of sale? A. I have no knowledge of being represented there. Q. When did you first know that such bill of sale had actual existence? A. When I received it. Q. When was that? A. I cannot tell the date. It was in the year 1894. Q. Then you knew nothing of it until some nine years after it was made? A. That was the first I knew of it, the year 1894."

In reference to the bonds referred to in the bill of sale from Stanley, the witness testified: "Q. When did you first know of the existence of the bill of sale? A. I think it was in the year 1894. Q. Some ten years after it was made? A. Do you want me to answer that? Q. Yes. A. I received it as I have stated heretofore, that was the first I knew of it. Q. Are you personally acquainted with Joseph Stanley? A. I am not; no, sir. Q. Did you ever meet him? A. Don't remember that I ever met him. Q. Did you at any time ever pay him \$15,887.50 for the bonds mentioned in his bill of sale to you? A. No, sir. Q. Is it not a fact that Mr. Stanley still owns these bonds? A. I have answered in a former deposition that I hold a bill of sale of certain bonds of Joseph Stanley. Q. Do you refuse to answer the last question I asked you, yes or no? A. I prefer to answer it as I have stated above. Q. If you should recover in this suit, are not the amounts represented by the coupons cut from the bonds mentioned in the Stanley bill of sale to be paid to Joseph Stanley less the expenses of this suit? A. I could not answer that definitely. Q. Why not? A. Because

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an exception to the ruling of the court being reserved. Other instructions asked by the plaintiff were refused, and in obedience to a peremptory instruction by the court the jury returned

I haven't enough knowledge of the matter to answer it definitely. Q. You have no knowledge of it at all personally, have you? A. My understanding of the matter would be, Joseph Stanley would have a certain amount of money if the suit was won. Q. Was not the bill of sale drawn in Denver—the Stanley bill of sale? A. I have no actual knowledge where it was drawn. Q. Do you know who had the bill of sale before it was sent on to you in 1894? A. I do not think I have any actual knowledge. Q. Did you have any sort of knowledge? A. Yes. I imagined it came from Rollins & Son. Q. By letter? A. It came through the mail. Q. Have you the letter now? A. I do not think that I have; no, sir. Q. What did you do with it? A. I could not swear that it was. Q. It came in December of 1894, did it not? A. I should say it did."

As to the bonds referred to in the bill of sale by Susan F. Jones, executrix, the witness testified: "Q. What did you pay for that bill of sale, Mr. Dudley? A. For consideration not named in the bill of sale. Q. That does not answer my question. What did you pay for it? A. I do not remember as I paid anything. Q. Do you remember that you did not pay anything? A. It is my impression that I did not. Q. Were you present when it was drawn? A. No, sir. Q. In the event you recover a judgment in this case, are not the amounts of the coupons belonging to the bonds mentioned in the bill of sale from Mrs. Jones to be paid to Mrs. Jones, less her proportion of [the expenses of] the case? A. I could not state definitely about that. Q. Why? A. For the reason that I answered similar questions above. Q. Going back to the bonds of Mr. Stanley, I will ask you one or two other questions. Is Mr. Stanley a citizen of Colorado? A. I think he is. Q. Now why did you not include in this case the coupons belonging to the Stanley bonds for 84, 85 and 86, and the coupons to bonds 68 to 72, including in the Stanley bill of sale of 1888, and the coupons on 67, 87-91 for 1884-'5? A. If they were not included I do not know why they were not. Q. Is Mrs. Jones a citizen of the State of Colorado? A. I think she is. Q. Were not those bonds of Stanley and Jones assigned to you in order that you might as a citizen of another State bring suit upon them and upon the coupons belonging to them in the Federal court in Colorado? A. I should answer that by referring to my answer in former deposition to Interrogatory 9."

In reference to the other bills of sale and the bonds mentioned in them, the witness testified: "Q. In your answer to Interrogatory 4 of your former deposition you also say that you own bonds of Lake County by the written bill of sale from the Nashua Savings Bank, numbered 92-111, both inclusive, together with all coupons originally attached and unpaid. You also say that the consideration for the said bill of sale is \$11,689.45. Did you pay any part of that, Mr. Dudley? A. No, sir. Q. Were you present

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a verdict for the defendant, and judgment was accordingly entered upon that verdict. Upon writ of error to the Circuit Court of Appeals the judgment was reversed, Judge Thayer dissenting. 49 U. S. App. 336.

1. In the oral argument of this case some inquiry was made

when the bill of sale was drawn? A. No, sir. Q. When did you first know that there was such a bill of sale? A. As soon as I received it, in the year 1894. Q. In the event of a recovery in this case, are not the amounts of the coupons belonging to the said bonds to be paid over to the Nashua Savings Bank, less their proportion of the expense of this litigation? A. I do not know how much will be paid them. Q. Do you know anything about it? A. Indirectly, yes. Q. Do you mean by that you have some hearsay evidence upon it? A. Yes; I have an impression from hearsay that the bank would have some equivalent for these bonds if suit was won. Q. You say here that you own bonds of Lake County by virtue of a bill of sale from the Union Five Cent Savings Bank of Exeter, numbered 112-129, inclusive, together with all coupons, the first being No. 4, and the subsequent ones being consecutive up to and including No. 21. What is the date of that bill of sale? A. I think it was dated March 25, 1885. Q. Were you present when it was made? A. No, sir. Q. When did you first know of its existence? A. In the year 1894. Q. At the time that you were informed of the existence of the others? A. Nearly at the same time, I should say. Q. Did you pay the Bank of Exeter \$10,695, or any other sum for the bonds mentioned in that bill of sale? A. No, sir. Q. You also say in the same answer to the same interrogatory in your former deposition that you hold a bill of sale and assignment from Susan F. Jones for coupons Nos. 55 to 64 and Nos. 65 to 66 for the years 1886, '7, '8, 1891, also coupons amounting to \$600 from bonds 55-6-7-8-9-60 falling due in the year 1894. What is the date of that bill of sale and assignment? A. I could not tell. Q. When did you first know of its existence? A. I should say in 1894. Q. Did you pay anything for it? A. No, sir. . . . Q. Did you ever have in your possession any of the coupons or any of the bonds to which this examination has thus far been directed? A. Strictly speaking, I don't think I ever had them in my own possession. I have seen some of the bonds and handled them, had them in a safe. Q. Where? A. In Boston. Q. When? A. Well, I should say in the year 1893. Q. But that was before you knew they had been assigned to you by bill of sale, was it not? A. I was really handling them as agent for other parties. Q. Who were the other parties you were handling them as agent for? A. I don't know as I was exactly an agent. I was an officer of another company. They came into our hands. Q. What was that company? A. E. H. Rollins & Sons. Q. Were you a stockholder of that company? A. Yes. Q. Are you now? A. Yes, sir. Q. Is not that the only interest which you have in these bonds or any of them — your interest as a stockholder in the firm of E. H. Rollins & Sons? A. Yes, probably it is."

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whether Dudley's right to maintain this action was affected by that clause in the first section of the Judiciary Act of August 13, 1888, c. 866, 25 Stat. 433, 434, providing that no Circuit or District Court of the United States shall "have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." The provision on the same subject in the act of March 3, 1875, but which was, of course, displaced by the clause on the same subject in the act of 1888, was as follows: "Nor shall any Circuit or District Court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange." 18 Stat. 470, c. 137, § 1.

Without stopping to consider the full scope and effect of the above provision in the act of 1888, it is only necessary to say that the instruments sued on being payable to bearer and having been made by a corporation are expressly excepted by the statute from the general rule prescribed that an assignee or subsequent holder of a promissory note or chose in action could not sue in a Circuit or District Court of the United States unless his assignor or transferrer could have sued in such court. It is immaterial to inquire what were the reasons that induced Congress to make such an exception. Suffice it to say that the statute is clear and explicit, and its mandate must be respected.

2. There is however a ground upon which the right of Dudley to maintain this action must be denied.

By the fifth section of the above act of March 3, 1875, it is provided "that if, in any suit, commenced in a Circuit Court or removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed

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thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just." 18 Stat. 470, 472, c. 137. This provision was not superseded by the act of 1887, amended and corrected in 1888. 25 Stat. 433. *Lehigh Mining & Manfg. Co. v. Kelly*, 160 U. S. 327, 339.

Prior to the passage of the act of 1875 it had been often adjudged that if title to real or personal property was put in the name of a person for the purpose only of enabling him, upon the basis of the diverse citizenship of himself and the defendant, to invoke the jurisdiction of a Circuit Court of the United States for the benefit of the real owner of the property who could not have sued in that court, the transaction would be regarded in its true light, namely, as one designed to give the Circuit Court cognizance of a case in violation of the acts of Congress defining its jurisdiction: and the case would be dismissed for want of jurisdiction. *Maxwell's Lessee v. Levy*, 2 Dall. 381; *Hurst's Lessee v. McNeil*, 1 Wash. C. C. 70, 80; *McDonald v. Smalley*, 1 Pet. 620, 624; *Smith v. Kernochen*, 7 How. 198, 216; *Jones v. League*, 18 How. 76, 81; *Barney v. Baltimore City*, 6 Wall. 280, 288. These cases were all examined in *Lehigh Mining & Manfg. Co. v. Kelly*, 160 U. S. 327, 339. In the latter case it appeared that a Virginia corporation claimed title to lands in that Commonwealth which were in the possession of certain individuals, citizens of Virginia. The stockholders of the Virginia corporation organized themselves into a corporation under the laws of Pennsylvania in order that the Pennsylvania corporation, after receiving a conveyance from the Virginia corporation, could bring suit in the Circuit Court of the United States sitting in Virginia, against the citizens in that Commonwealth

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who held possession of the lands. The contemplated conveyance was made, but no consideration actually passed or was intended to be passed for the transfer. This court held that within the meaning of the act of 1875 the case was a collusive one and should have been dismissed as a fraud on the jurisdiction of the United States court. It said: "The arrangement by which, without any valuable consideration, the stockholders of the Virginia corporation organized a Pennsylvania corporation and conveyed these lands to the new corporation for the express purpose—and no other purpose is stated or suggested—of creating a case for the Federal court, must be regarded as a mere device to give jurisdiction to a Circuit Court of the United States, and as being in law a fraud upon that court, as well as a wrong to the defendants. Such a device cannot receive our sanction. The court below properly declined to take cognizance of the case." And this conclusion, the court observed, was "a necessary result of the cases arising before the passage of the act of March 3, 1875."

From the evidence in this cause of Dudley himself it is certain that he does not in fact own any of the coupons sued on and that his name, with his consent, is used in order that the Circuit Court of the United States may acquire jurisdiction to render judgment for the amount of all the coupons in suit, a large part of which are really owned by citizens of Colorado, who, as between themselves and the Board of Commissioners of Lake County, could not invoke the jurisdiction of the Federal court, but must have sued, if they sued at all, in one of the courts of Colorado. It is true that some of the coupons in suit are owned by corporations of New Hampshire who could themselves have sued in the Circuit Court of the United States. But if part of the coupons in question could not by reason of the citizenship of the owners have been sued on in that court, except by uniting the causes of action arising thereon with causes of action upon coupons owned by persons or corporations who might have sued in the Circuit Court of the United States, and if all the causes of actions were thus united for the collusive purpose of making "a case" cognizable by the Federal court as to every issue made in it, then the act

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of 1875 must be held to apply, and the trial court on its own motion should have dismissed the case without considering the merits.

In *Williams v. Nottawa*, 104 U. S. 209, 211, this court said that Congress when it passed the act of 1875 extending the jurisdiction of the courts of the United States "was specially careful to guard against the consequences of collusive transfers to make parties, and imposed the duty on the court, on its own motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of the kind appeared. This was for the protection of the court as well as parties against frauds upon its jurisdiction."

So, in *Farmington v. Pillsbury*, 114 U. S. 138, 146, which was a suit upon coupons, brought by a citizen of Massachusetts against a municipal corporation of Maine, and in which one of the questions was as to the real ownership of the coupons, this court said: "It is a suit for the benefit of the owners of the bonds. They are to receive from the plaintiff one half of the net proceeds of the case they have created by their transfer of the coupons gathered together for that purpose. The suit is their own in reality, though they have agreed that the plaintiff may retain one half of what he collects for the use of his name and his trouble in collecting. It is true the transaction is called a purchase in the papers that were executed, and that the plaintiff gave his note for \$500, but the time for payment was put off for two years, when it was, no doubt, supposed the result of the suit would be known. No money was paid, and as the note was not negotiable, it is clear the parties intended to keep the control of the whole matter in their own hands, so that if the plaintiff failed to recover the money he could be released from his promise to pay." It was consequently held that the transfer of the coupons was "a mere contrivance, a pretence, the result of a collusive arrangement to create a fictitious ground of Federal jurisdiction."

In *Little v. Giles*, 118 U. S. 596, 603, reference was made to the act of 1875, and the court said that where the interest of the nominal party was "simulated and collusive, and created for the very purpose of giving jurisdiction, the courts

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should not hesitate to apply the wholesome provisions of the law."

We have held that if, for the purpose of placing himself in a position to sue in a Circuit Court of the United States, a citizen of one State acquires a domicile in another State without a present intention to remain in the latter State permanently or for an indefinite time, but with the present intention to return to the former State as soon as he can do so without defeating the jurisdiction of the Federal court to determine his suit, the duty of the Circuit Court is on its own motion to dismiss such suit as a collusive one under the act of 1875. *Morris v. Gilmer*, 129 U. S. 315. The same principle applies where there has been a simulated transfer of a cause of action in order to make a case cognizable under the act.

The cases cited are decisive of the present one. As the coupons in suit were payable to bearer and were made by a corporation, Dudley being a citizen of New Hampshire could have sued the defendant a Colorado corporation in the Circuit Court of the United States without reference to the citizenship of his transferrers or the motive that may have induced the transfer of the coupons to him, or the motive that may have induced him to buy them, provided he had really purchased them. But he did not buy the coupons at all. He is not the owner of any of them. He is put forward as owner for the purpose of making a case cognizable by the Federal court as to all the causes of action embraced in it. The apparent title was put in him without his knowledge and without his request, and only that he might represent the interests of the real owners. He never requested the execution of the pretended bills of sale referred to, nor did he hear of their being made until more than nine years after they were signed. And, notwithstanding the evasive character of his answers to questions, it is clear that his transferrers are the only real parties in interest and his name is used for their benefit. The transfer was collusive and simulated for the purpose of committing a fraud upon the jurisdiction of the Circuit Court in respect at least of part of the causes of action that make the case before the court.

For the reasons stated the trial court, when the evidence

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was concluded, should on its own motion have dismissed the suit. The judgment of the Circuit Court and the judgment of the Circuit Court of Appeals must both be

Reversed and the cause remanded for a new trial and for further proceedings consistent with this opinion, and it is so ordered.
